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The Search and Seizure Exclusionary Rule

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REPORT TO THE ATTORNEY GENERAL

ON

THE SEARCH AND SEIZURE EXCLUSIONARY RULE

'Truth in Criminal Justice'
Report No. 2

Office of Legal Policy

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EXECUTIVE SUMMARY

The fourth amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." This guaranty is not self-executing, however, and the courts and criminal justice systems in this country have long been bedeviled by questions concerning appropriate methods of ensuring its observance. As a result of the Supreme Court's decisions in *Weeks v. United States*[1] and *Mapp v. Ohio*,[2] the method principally relied upon today is a judicially created rule excluding from criminal trials evidence obtained in violation of the defendant's fourth amendment rights.

The search and seizure exclusionary rule is subject to a number of well-founded criticisms. First, the rule has no support in the "original intent or meaning" of the Framers of the Constitution. Second, the validity of the rule's deterrence rationale has yet to be demonstrated. Third, among its other drawbacks, the rule impairs significantly the search for truth in criminal justice. Finally, alternative methods for deterring and redressing fourth amendment violations exist or could be created, and those alternatives would be more effective and less costly than the exclusionary rule.

A. History Of The Exclusionary Rule

The fourth amendment had its genesis in antipathy to Crown search and seizure abuses under the general writs of the colonial period, and the warrant clause is clearly a response to the abuses of general writs. The addition of the search and seizure clause may indicate a perception on the Framers' part that the warrant clause alone would be insufficient to limit all abuses. The Framers did not consider the problem of warrantless searches in the modern sense, as municipal police departments were a development of the nineteenth century.

Through the mid-nineteenth century, the typical remedy for an illegal search was a civil action for damages against the transgressor. During the nineteenth century, courts followed the common law rule, which was to allow the products of illegal searches and seizures into evidence. Indeed, it was not until *Boyd v.*

1. 232 U.S. 383 (1914).
2. 367 U.S. 643 (1961).

United States[3] that an exclusionary rule was employed, and there in a seizure of private papers case where the Court believed that the admission of the papers into evidence would violate the fifth amendment.

The fourth amendment exclusionary rule made its debut in *Weeks v. United States*,[4] where the Supreme Court concluded that fourth amendment protection would be "of no value" if illegally seized letters and documents could be used as evidence against their owner. A few years later, in *Gouled v. United States*[5] and *Amos v. United States*,[6] the Supreme Court rejected the common-law rule in favor of inclusion and adopted the exclusionary rule for illegal searches by persons acting under federal authority.

Over the next several decades, approximately one-third of the states adopted the exclusionary rule. But in 1949 the Supreme Court, in *Wolf v. Colorado*,[7] squarely rejected the contention that the suppression of evidence was vital to the protection of fourth amendment rights as incorporated against the states through the Due Process Clause of the fourteenth amendment.

Beginning in 1960, the Supreme Court began to overrule earlier cases and substantially expand the reach of the exclusionary rule. *Elkins v. United States*[8] reversed earlier precedent and rejected the "silver platter" doctrine that had allowed the federal government to use in its prosecutions evidence illegally obtained by state authorities. Then, in *Mapp v. Ohio*,[9] the Supreme Court overruled *Wolf* and applied the exclusionary rule to the states. *Mapp* grounded the rule in both the fourth and fifth amendments and in the rule's supposed effect in deterring constitutional violations. During the next several years the Warren Court gradually extended the reach of the rule. By the late 1960s, with legal and public criticism mounting, the Court began a slow process of first refusing to extend, and later limiting, the scope of the rule. In 1984, the Supreme Court decided three important exclusionary rule cases. In *United States v. Leon*[10] and *Massachusetts v. Sheppard*,[11] the Court held that the exclusionary rule does not bar the use of evidence seized by officers acting

3. 116 U.S. 616 (1886).
4. 232 U.S. 383 (1914).
5. 255 U.S. 292 (1921).
6. 255 U.S. 313 (1921).
7. 338 U.S. 25 (1949).
8. 364 U.S. 206 (1960).
9. 367 U.S. 643 (1961).
10. 468 U.S. 897 (1984).
11. 468 U.S. 981 (1984).

in objectively reasonable reliance on a search warrant issued by a detached and neutral magistrate, but subsequently found to be unsupported by probable cause. In *INS v. Lopez-Mendoza*,[12] the Court refused to apply the exclusionary rule to illegal searches and seizures by immigration agents that yield evidence for use in deportation proceedings. In these cases, the Court expressly rejected any claim that the exclusionary rule is required by the Constitution, and characterized even the "supervisory role" over law-enforcement conduct as something best left to the political branches of government.

B. Arguments For And Against The Exclusionary Rule

At least since the time Cardozo asked whether the "criminal is to go free because the constable has blundered,"[13] the exclusionary rule has been defended on two major grounds. Beginning with *Weeks*, many courts have argued that the rule is a necessary means of "preserving judicial integrity." This rationale is rooted in the "principle" that a court that accepts tainted evidence effectively ratifies the violation by which such evidence was obtained, and thereby taints itself and the justice system as a whole. Although this rationale was embraced by the Supreme Court in *Mapp*, and still appears in the opinions of some dissenting justices, it has apparently been abandoned as an independent justification by the Court in recent years. Instead, the Court has justified the continuation of the rule on the theory that it deters fourth amendment violations by removing the incentive for official misconduct.

It is not surprising, therefore, that in recent opinions the Supreme Court has evaluated suppression questions by weighing whether exclusion in a particular context would result in sufficient deterrence of future misconduct to counterbalance the cost to society in freeing the guilty. It was exactly this "balancing" approach that led to the "good faith" exceptions in *Sheppard* and *Leon*.

Despite a general lack of empirical evidence on the effect of the exclusionary rule in deterring violations, courts have often simply assumed that the rule deters fourth amendment violations, and have justified suppression on this assumption. At best, however, available evidence indicates the deterrent value of

12. 468 U.S. 1032 (1984).
13. People v. DeFore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

the rule to be problematic. Commentators have argued that it affects police officers indirectly, if at all, and that officers often do not receive information adequate to bring their conduct into compliance with the fourth amendment standards articulated by the courts. Supporters of the exclusionary rule respond that the rule has made the criminal justice system as a whole more aware of, and sensitive to, search and seizure standards.

The "cost" of the exclusionary rule to society is, most clearly, the release of obviously guilty criminals. This is a serious matter, even though it appears that only a relatively small fraction of cases is lost as a consequence of successful suppression motions. Less clear is the effect of the rule on decisions not to prosecute and upon plea-bargaining. Prosecutors may well be less likely to prosecute where there are potential search and seizure problems.

These are not the only arguments against the exclusionary rule. Other claimed disadvantages of the rule are that it excludes especially reliable and probative evidence; it diminishes respect for the entire system of justice; it benefits only the guilty; it may encourage police and judicial misconduct to circumvent the suppression sanction; it discourages the search for alternatives; and it distorts the allocation of judicial and criminal justice resources.

Aside from these policy concerns, there is a substantial constitutional objection to the continued application of the rule to the states. The Supreme Court has disclaimed any constitutional requirement for the exclusionary rule and concedes that it is merely a "prophylactic" rule imposed by the courts in the exercise of "supervisory power." Yet the Supreme Court has never claimed any supervisory power over state courts. Thus, it is an anomaly for the Court to continue to apply to the states a rule that is not constitutionally mandated.

More fundamentally, critics claim, the exclusionary rule at all levels is objectionable under the very rationale maintained by the Court. The argument that exclusion is justified upon a consideration of costs and benefits, and of the lack of alternative deterrents and remedies, is undercut by the reality of in-place alternatives and the possibilities of other, less costly, methods of enforcing fourth amendment rights.

C. *Other Methods Of Preventing And Redressing Fourth Amendment Violations*

No other nation, including those with a common-law heritage, has adopted an American-style exclusionary rule solution to the problem of illegally seized evidence, although Canada recently amended its charter to provide its courts with discretion to suppress evidence in certain cases of constitutional violations. Other nations, including England and West Germany, allow suppression in certain cases of egregious misconduct, but these nations and others generally prefer to rely upon a variety of civil actions and administrative remedies (and sometimes criminal penalties) to deter and punish police misconduct.

Within the United States, a number of alternatives to the exclusionary rule are available to deter and punish fourth amendment violations. Under certain circumstances an officer may be subject to criminal penalties under state or federal law. To date, however, criminal penalties have not been used widely. This may be due in part to a reluctance to punish police so severely, or more probably—at least at the federal level—to the lack of cases involving willful or malicious misconduct.

A number of administrative tools have also been developed to prevent and punish violations, including comprehensive officer training and education, rules and regulations, internal law enforcement investigations of alleged abuse, and disciplinary measures for violations. For example, all non-FBI Department of Justice law enforcement officers are subject to the provisions of Department of Justice Order 1752.1A, which specifies discipline for a number of offenses, including violations of rules governing searches and seizures.

In addition to existing criminal and administrative sanctions, some commentators have suggested toughening procedures in this area by encouraging the development of independent review boards. Such boards would review allegations of police misconduct outside the forum of prosecution of the accused. They would have authority to investigate and punish abusers and, perhaps, to refer cases for criminal prosecution in instances of serious misconduct. Another alternative, occasionally employed in the past, is injunctive relief against police departments and law enforcement entities engaged in a systematic pattern of search and seizure violations.

Over the last two decades, the Supreme Court has revolutionized the law relating to constitutional torts, resulting in increas-

ing numbers of civil damage actions in instances of alleged constitutional violations. Beginning with *Monroe v. Pape*,[14] the Court has greatly expanded the scope of liability of state and local officials under 42 U.S.C. § 1983, including liability for illegal searches and seizures. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[15] the Supreme Court created a similar direct cause of action for damages by victims of illegal searches against federal officers. Since 1971 some 12,000 *Bivens* suits have been filed against federal employees—though very few of these appear to have been cases of alleged fourth amendment violations.

In 1974 Congress amended the Federal Tort Claims Act (FTCA) to permit suits directly against the government for fourth amendment violations, though the remedy evidently has not been widely used to date. Damages may also be sought by victims of illegal wiretaps under 18 U.S.C. § 2520.

While each of these civil actions provides an alternative to the exclusionary rule, none is entirely satisfactory. Among their drawbacks are the problems of subjecting law enforcement officers to enormous potential personal liability, the encouragement of spurious lawsuits, and the prospect that such actions may have a chilling effect on law enforcement.

Replacing the exclusionary rule with some combination of other deterrents and/or remedies is one approach to reform. But a number of commentators and jurists have suggested ways to modify or curtail the exclusionary rule, and thereby reduce its costs, without abandoning it entirely. For example, the Administration has supported the enactment of legislation expanding the "good faith" exception to cover non-warrant cases. The Chief Justice, among others, has suggested not using the exclusionary rule for the most serious types of crime. Other approaches would save the suppression remedy for only the most serious forms of police misconduct.

D. A Suggested Approach To Fourth Amendment Violations

In light of the serious problems caused by the exclusionary rule, and the availability of less costly means of redressing and deterring fourth amendment violations, the Office of Legal Pol-

14. 365 U.S. 167 (1961).
15. 403 U.S. 388 (1971).

icy recommends that the Department pursue a policy designed to result in the abolition of the exclusionary rule.

In recent years the Supreme Court has grown increasingly disenchanted with the rule as a solution for search and seizure violations. It has generally refused to expand the scope of the rule, and, in *Leon* and *Sheppard*, created a significant exception to it. Individual Justices have called for the development of alternatives in Congress and by the states.

In this environment, it is important to take advantage of the Court's increasing lack of confidence in the utility of the exclusionary rule as a deterrent to police misconduct, to highlight the costs of continued reliance upon the rule, and to persuade the Court that alternatives exist that effectively redress and deter violations.

E. Conclusions And Recommendations

The Office of Legal Policy recommends a program of legislative, litigative, and administrative initiatives to abolish the exclusionary rule. With regard to legislation, the Department should encourage an amendment to S. 237, the principal exclusionary rule bill pending in Congress, that would abolish the rule. We should also support amendments to the Federal Tort Claims Act to make the United States the exclusive defendant in suits based on constitutional torts by federal employees. The enactment of such a statute might help convince the Supreme Court that viable alternatives to the rule were in place.

On the litigative front, the Department should urge the Court to end the application of the rule in federal and state prosecutions. If possible, the vehicle should be a case involving a fourth amendment violation which does not feature intentional or willful misconduct and which would allow the Court to go beyond the context of objective "good faith" conduct by the officers.

In the administrative area, the Department should actively publicize the effectiveness of existing administrative practices, and should review those practices to find how they might be strengthened without detriment to fair and effective law enforcement.

Finally, the Department should consider commissioning or undertaking empirical research on the effectiveness of existing civil remedies, and the degree to which the need to resolve suppression motions now burdens the system. The results of such studies could be used to persuade the courts of the high cost of the

exclusionary rule, and to support the argument that viable alternatives exist.

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THE SEARCH AND SEIZURE EXCLUSIONARY RULE

INTRODUCTION AND SUMMARY

For nearly 100 years after the adoption of the fourth amendment, the courts were rarely called upon to consider the question of how its prohibitions should be enforced. Over the past century, however, this question has become one of the criminal law's most predominant and enduring issues and, in recent years, it has commanded the expenditure of extraordinary amounts of time and energy by participants in the nation's criminal justice system, to say nothing of the attention it has received from legal scholars and other commentators. This Report discusses the provisions of law that have been developed to deter and redress fourth amendment violations by federal law enforcement officers, argues that there is a need to reform those provisions, and suggests a possible approach to that end.

A. Issues Presented By Fourth Amendment Violations

When evidence of criminal conduct is obtained by means of a search or seizure conducted in violation of the fourth amendment, three separate issues arise: (1) whether to permit use of the evidence at trial; (2) how to prevent such unlawful conduct in the future; and (3) how to compensate the victim of the fourth amendment violation. The first issue implicates primarily the interests of society in deciding guilt or innocence in criminal cases efficiently and on the basis of all probative, reliable, and non-privileged evidence available. The second issue involves the interest of society in deterring unreasonable searches and seizures in a manner that does not discourage fearless and vigorous law enforcement. The third issue concerns primarily the individual's interest in obtaining redress for damages suffered as a result of an unconstitutional intrusion.

B. Synopsis Of Current Federal Law

Current federal law addresses these issues and interests through a combination of judicial, legislative, and administrative provisions. The principal components of current law are: the exclusionary rule, which exists primarily to deter fourth amendment violations; civil remedies, which are intended partly to deter but primarily to provide redress for such violations; and administrative practices, which are designed to prevent and punish unlawful searches and seizures.

The exclusionary rule is a judicially created limitation on the use of probative and reliable evidence of guilt in criminal trials. Under the rule as it has been developed by the Supreme Court, such evidence may not be used in the prosecution's case-in-chief if it was acquired in violation of the fourth amendment rights of the accused, unless the responsible law enforcement officers were acting in objectively reasonable reliance on a warrant subsequently determined to be invalid. Prior to the adoption of this rule, relevant, non-privileged evidence was admissible in a federal criminal proceeding regardless of how it was obtained by the government. At the time it adopted the rule, and for a number of years thereafter, the Supreme Court relied on several justifications, including arguments that the rule was necessary to protect fourth amendment rights and to avoid creating the appearance that the judiciary condoned fourth amendment violations. All but one of these rationales have given way over time, and today the deterrence rationale appears to be the Court's sole justification for retaining the exclusionary rule.

A person who is subjected to an unlawful search and seizure conducted by a federal law enforcement officer has several avenues of redress under existing federal law. First, if the fourth amendment violation results in a criminal prosecution, redress of sorts is provided by the exclusionary rule itself—unless the officer was acting in objectively reasonable reliance on a warrant, the person is entitled to have excluded from the government's direct case any evidence obtained as a result of the constitutional violation. Second, whether or not the violation leads to prosecution, the aggrieved person can sue the responsible officers for damages under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*;[16] or, if the violation involves unlawful electronic surveillance, he can sue under 18 U.S.C.

16. 403 U.S. 388 (1971).

§ 2520. Third, the victim of an unlawful search or seizure may also bring a tort action for damages against the federal government under a 1974 amendment to the Federal Tort Claims Act.

Administrative mechanisms for preventing and punishing fourth amendment violations by federal law enforcement officers include education in the law of search and seizure, rules and regulations governing investigative and law enforcement activity that implicates fourth amendment interests, and disciplinary procedures and sanctions for conduct in violation of the rules and regulations.

C. Summary

Part I of this Report traces the history of the fourth amendment exclusionary rule. This portion of the paper begins with a brief discussion of "original intent," showing that the Framers of the Constitution had no expectation that the fourth amendment would be enforced by excluding reliable and probative evidence from criminal trials. The origins and development of the suppression doctrine are then reviewed, as are the major Supreme Court cases that reflect the ebb and flow of its application over the years. The most important of these are the decisions that established the exclusionary rule in the federal system (*Boyd* and *Weeks*), that extended the fourth amendment, but not the exclusionary rule, to the states (*Wolf*), that applied the suppression doctrine to the states (*Mapp*), that carved out a "good faith" exception for searches based on invalid warrants (*Leon*), and that refused to apply the rule in deportation proceedings, in part because of the government's voluntary efforts to prevent and punish fourth amendment violations (*Lopez-Mendoza*). Finally, Part I summarizes the rule's current precarious position in light of recent Supreme Court decisions and legislative activity in Congress.

Part II sets forth briefly the principal arguments in the debate over the merits of the exclusionary rule. The two major justifications offered for the rule are that it preserves the integrity of the courts and that it deters fourth amendment violations. The principal opposing arguments are that the rule excludes the most reliable evidence from criminal trials, causes the release or lenient treatment of guilty defendants, erodes public respect for the law, squanders scarce criminal justice resources, and imposes other unnecessary costs and burdens on the criminal justice system.

Part III examines methods, other than the exclusionary rule, for preventing and redressing fourth amendment violations. This portion of the Report begins by reviewing the treatment of unlawful searches and seizures in three other countries—England and Canada, which share the common law heritage of the United States, and the Federal Republic of Germany, which does not. There follows a discussion of various alternatives that exist or that might be adopted in the federal system to prevent and remedy fourth amendment violations. These approaches include criminal prosecutions, existing and proposed administrative practices, the use of equitable remedies, and reliance on statutory and non-statutory civil suits for damages. Part III concludes with a review of three proposals to curtail the application of the exclusionary rule—by making the "good faith" exception applicable to warrantless searches, by applying the rule only in cases involving less serious crimes, and by limiting suppression to instances of egregious fourth amendment violations.

Part IV argues that the exclusionary rule should be abolished entirely, rather than simply reduced in scope. There are serious obstacles to achieving this goal through legislation, but the Supreme Court might be persuaded to abolish the rule on the ground that there exist less costly but no less effective alternatives for achieving deterrence and redress. Also analyzed in Part IV are proposed alternatives for achieving deterrence and redress in the event of abolition of the rule. In addition, this Part describes several initiatives that could be taken by the Administration to pave the way for abolition. These include efforts to focus public attention on the prophylactic and punitive aspects of existing federal administrative policies and practices in the fourth amendment area, as well as efforts to strengthen the deterrent potential of these provisions, perhaps by creating a review board within the Executive Branch to examine all questionable searches and seizures and to impose appropriate disciplinary measures when warranted. Also discussed are possible amendments to the Federal Tort Claims Act to make it a more attractive remedial device, perhaps by allowing awards of liquidated damages. In addition, empirical studies of the operation of these alternative mechanisms could be undertaken to demonstrate that adequate deterrence and redress can be achieved by methods less costly than the exclusionary rule.

The body of the Report concludes with a summary of recommended legislative, litigative, and administrative initiatives that the Department should undertake to eliminate the rule completely from federal and state criminal proceedings. These in-

clude supporting Congressional efforts to abolish the rule and to create an exclusive damage remedy against the United States in its stead; arguing in appropriate Supreme Court cases that the rule is unnecessary and unwise in the federal system and that there is no sound doctrinal basis for its imposition in state cases; and undertaking "outreach" efforts and empirical research to support the goal of total abolition.

Finally, included in Appendix B is a brief description of a sample of exclusionary rule cases that illustrate the rule's absurd and potentially dangerous consequences.

I. HISTORY OF THE EXCLUSIONARY RULE

The rule that reliable and probative physical evidence of guilt may not be introduced in the prosecution's case-in-chief if it was obtained in violation of the defendant's fourth amendment rights was unknown to the law in this country for almost 100 years after the fourth amendment was adopted. This section reviews the origins and development of the exclusionary rule, traces the ebb and flow of its application over the past thirty years, and describes its current precarious status.

A. The Framers' Original Intentions And The Exclusionary Rule

The exclusionary rule is not mentioned in the Constitution. Indeed, it was not until nearly a century after the ratification of the fourth amendment that courts began to suppress evidence as a remedy for constitutional violations. Scholars generally agree on the historical background of the origin of the fourth amendment. The relevant history indicates that while the Framers were greatly concerned about wrongful searches, the practice of their time did not include the exclusion of evidence as a remedy for such searches, and it does not appear that the Framers or ratifiers of the fourth amendment contemplated suppression as a remedy for its violation.

Unlike other provisions of the Bill of Rights, which grew out of more ancient principles of English jurisprudence, the fourth amendment developed particularly as a reaction against abuses

leading to the American Revolution.[17] During the 1760s, widespread colonial opposition developed to the Crown's use of general warrants and writs of assistance. General warrants were issued by royal officers and gave officials carte blanche to search anywhere for anything. Writs of assistance were similar but were authorized by Parliament rather than the Crown. The colonists viewed both as illegal because they authorized the search of private residences without probable cause.[18] There was resistance to this practice in both English and colonial courts. In the case of *Entick v. Carrington*[19] damages of three hundred pounds were awarded in favor of a pamphleteer whose premises were ransacked by officers acting under a general warrant. The decision was affirmed on appeal. In the American colonies, attempts to enforce general warrants were sometimes met with violent resistance.[20]

Against this backdrop a number of the newly independent states placed prohibitions against general warrants in their state declarations of rights. In 1776, Virginia's Bill of Rights prohibited general warrants, as did the Declarations of Rights soon thereafter adopted by Maryland and North Carolina. Pennsylvania and Vermont announced a general right of their people to "hold themselves, their homes, and their papers and possessions free from search and seizure" in the absence of proper warrants. In 1780, the Massachusetts Declaration of Rights first used the phrasing "unreasonable searches and seizures" that was later to become part of the fourth amendment.[21]

It appears that the principal concern of the colonists and of the early state legislatures was the problem of general warrants, rather than official misconduct in what we today think of as the "warrantless search" area. This focus was natural. Municipal police departments were a development of the nineteenth century. Other than those conducted at a person's premises, most searches for criminal evidence in the eighteenth century were made incident to arrest following hot pursuit or the "hue and cry," or incident to execution of an arrest warrant.[22]

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17. *See* Rader, *Legislating a Remedy for the Fourth Amendment*, 23 S. TEX. L.J. 585, 590 (1982).

18. *See* Harris, *Back to Basics: An Examination of the Exclusionary Rule in Light of Common Sense and the Supreme Court's Original Search and Seizure Jurisprudence*, 37 ARK. L. REV. 646 (1983).

19. 19 Howell's State Trials 1029 (1765).

20. *See* Rader, *supra* note 17, at 595-96.

21. *See* Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an Empirical Proposition?*, 16 CREIGHTON L. REV. 565, 571-79 (1983).

22. *Id.* at 571-72.

In the First Congress, James Madison, who led the fight for a bill of rights, initially proposed an amendment on the subject of search and seizure that spoke directly only to the problem of general warrants. Madison's proposal was sent to the Committee of Eleven, which reported a modified version of the proposal that placed even greater emphasis on warrant procedure by dropping Madison's mention of "unreasonable searches and seizures." One member of the House, Congressman Benson of New York, objected that the measure was insufficient, but his motion to add a separate provision addressing unreasonable searches apart from the warrant requirement was defeated. However, after the inchoate Bill of Rights was referred to a committee (on which Benson served) "to arrange the amendments," the language establishing the unreasonable search and seizure clause was restored and subsequently approved by the full House. It is not altogether clear to what degree the Congress thought the two clauses were linked.[23]

It is also not clear to what extent the Framers contemplated enforcement mechanisms. The warrant clause is the only express device against wrongful searches mentioned in the amendment itself, although it is probable that Madison and the many lawyers in Congress at the time were fully aware that in *Entick* and other celebrated cases a trespass action for damages had won judicial approval as a remedy for those injured by an illegal search.

Several early Supreme Court cases shed some light on search and seizure enforcement in the decades following ratification. In *Gelston v. Hoyt*[24] Justice Story explicated federal search and seizure principles in a case involving the condemnation and subsequent search of a ship. After restating the common-law principle that anyone might seize property at his peril, Story explained that since a condemnation court in the case had, subsequent to the seizure, refused to issue a certificate of probable cause to immunize the officers involved, and the forfeiture was thus not upheld, the defendants were liable for trespass and must respond to the ship's owners in damages.[25] In a subsequent decision the Supreme Court held that there was no liability where seized goods were actually subject to forfeiture, notwithstanding possible irregularities in the search procedure itself.[26]

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23. *See* Rader, *supra* note 17, at 587-90.
24. 16 U.S. (3 Wheat.) 246 (1818).
25. *See* Harris, *supra* note 18, at 657-61.
26. Wood v. United States, 41 U.S. (16 Peters) 342 (1842).

These and other early cases[27] may be read together for the proposition that in the early American republic,

> searches of private premises generally required warrants. In all other circumstances warrants were unnecessary. Any person, including a private citizen acting entirely on his own, could search and seize at his peril. If the search uncovered contraband or property otherwise subject to forfeiture, then he was completely justified. If, however, the search proved fruitless, then the party who made the search was liable for damages unless he could find the shelter of a statute. A search conducted in good faith pursuant to statutory authority was considered reasonable.[28]

The Framers do not seem to have considered suppression as a remedy for unconstitutional searches. They were, however, aware of the remedies available in the law of their time. It seems fair to infer that they believed these remedies adequate, at least for the problems of their era.

B. The Common Law Rule

Under the common law rule, which was affirmed by the Supreme Court in *Adams v. New York*,[29] a defendant could not object at trial to the use of evidence obtained in violation of his rights under the fourth amendment. The rationale for this rule was straightforward and sensible—as the court stated in *Commonwealth v. Dana*:

> Admitting that the lottery tickets and materials were illegally seized, still this is no legal objection to the admission of them in evidence. If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence, if they were pertinent to the issue.

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27. *E.g.*, The Appollon, 22 U.S. (9 Wheat.) 362 (1824) (officers not immune from liability when ship acquitted in condemnation proceeding even where probable cause existed); Taylor v. United States, 44 U.S. (3 How.) 197 (1845) (customs officer immune where goods seized had been fraudulently imported even if seizure had been irregular).

28. Harris, *supra* note 18, at 647.

29. 192 U.S. 585 (1904).

> When papers are offered in evidence, the court can take no notice how they are obtained, whether lawfully or unlawfully.[30]

C. *Origins Of The Exclusionary Rule*

The exclusionary rule had its genesis in two cases involving the use of private papers as evidence against the owner at trial. In the first case, *Boyd v. United States*,[31] the owner of goods that were the subject of federal forfeiture proceedings complied with a pretrial order to produce an invoice relating to the goods, but objected on fourth and fifth amendment grounds. Noting the "intimate relation" between the two amendments,[32] the Supreme Court concluded that the invoice should not have been ordered to be produced or admitted as evidence because its compulsory production required the owner of the goods to be a witness against himself within the meaning of the fifth amendment. In dicta, the Court added that this manner of acquiring evidence also constituted an unreasonable search and seizure in violation of the fourth amendment.

In the second case, *Weeks v. United States*,[33] evidence introduced at the trial of a defendant charged with using the mails to transmit lottery tickets included letters and other private documents seized by United States Marshals during a warrantless search of his home. The Supreme Court held that the defendant's pretrial motion for return of the papers—based on both the fourth and fifth amendments—should have been granted because seizure of the papers violated the fourth amendment. Although *Weeks* is often regarded as the case that imposed the exclusionary rule on the federal courts, its actual holding did not extend significantly beyond *Boyd*. The true significance of *Weeks* lay in the Court's sole reliance on the fourth amendment, in its view that "[t]he tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizure . . . should find no sanction in the judgments of the courts,"[34] and in its conclusion that the protections of the fourth amendment would be "of no value" if letters and documents

30. 43 Mass. (2 Met.) 329, 337 (1841).
31. 116 U.S. 616 (1886).
32. *Id.* at 633.
33. 232 U.S. 383 (1914).
34. *Id.* at 392.

could be seized unlawfully and used as evidence against the owner.[35]

D. Exclusionary Rule Developments Prior To Wolf

Two decisions in 1921 firmly established the exclusionary rule in the federal courts. In *Gouled v. United States,*[36] the Court unanimously rejected the common law rule previously affirmed in *Adams* that prevented a criminal defendant from objecting at trial to the manner in which the government had obtained its evidence. That rule, the Court reasoned, was merely procedural and, therefore, should not prevail over a constitutional right.[37] And in *Amos v. United States,*[38] decided the same day as *Gouled,* the Court held that whiskey seized unlawfully from the defendant's home should have been excluded from evidence. By making it clear that private papers are not the only things that may be inadmissible on fourth amendment grounds, this decision began a trend of focusing on the manner in which the government obtained its evidence rather than on the nature of the evidence.

Because the exclusionary rule that developed in *Weeks* and its progeny was based on the fourth amendment, the Court limited its scope to persons acting under federal authority, and did not apply it to searches by state officials.[39] Under that approach, the so-called "silver platter doctrine," federal courts could admit evidence that had been illegally seized by *state* officers. Similarly, the Court declined to apply the rule to evidence obtained by means of illegal conduct that did not violate the fourth amendment.[40]

Among the states, the number of jurisdictions adopting the exclusionary rule under state constitutions increased steadily following *Weeks.* In *People v. Marxhausen,*[41] Michigan became the first state after *Weeks* to adopt an exclusionary rule for violations of search and seizure requirements. By 1949, 47 states had passed on the *Weeks* doctrine. Of these, 16 had adopted it

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35. *Id.* at 393.
36. 255 U.S. 298 (1921).
37. *Id.* at 312.
38. 255 U.S. 313 (1921).
39. *Weeks,* 232 U.S. at 398 (search conducted by policeman not acting under any claim of federal authority).
40. Olmstead v. United States, 277 U.S. 438 (1928) (non-trespassory wiretap).
41. 204 Mich. 559, 171 N.W. 557 (1919).

and the remaining 31, including Iowa—which had been the only state to adopt an exclusionary rule prior to *Weeks*—had rejected it.[42]

E. Wolf v. Colorado

In *Wolf v. Colorado*,[43] the Supreme Court held that, although the Due Process Clause of the fourteenth amendment incorporated the fourth amendment prohibition against unreasonable searches and seizures, it did not forbid the admission of evidence obtained by such unlawful methods in a state court prosecution for a state crime. After explaining that the *Weeks* rule was not derived from the explicit requirements of the fourth amendment or from a legislative expression of Congressional policy, but rather was a matter of judicial implication, the Court advanced two reasons for not extending it to the states. First, the Court said, the remedy of exclusion could not be considered vital to protection of the fourth amendment right to privacy—applicable to the states by virtue of the fourteenth amendment—in light of the 31-16 margin of rejection of the exclusionary rule by the states and the failure of any jurisdiction in the British Commonwealth to adopt the rule. Second, the Court pointed out, the states that had rejected the *Weeks* doctrine had provided other means of protecting privacy, such as private civil actions and police discipline, that if consistently enforced would be equally effective. In this connection, the Court observed that the reasons for excluding evidence unreasonably obtained by federal agents were less compelling in the case of the state or local police because community opinion could be exerted far more effectively on the latter than on the former. Finally, the Court observed that if Congress were to pass a statute purporting to negate the *Weeks* doctrine "[w]e would be faced with the problem of the respect to be accorded the legislative judgment on an issue as to which, in default of that judgment, we have been forced to depend upon our own."[44]

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42. *See* Wolf v. Colorado, 338 U.S. 25, 33-39 (1949).
43. 338 U.S. 25 (1949).
44. *Id.* at 33.

F. Expansion Of The Exclusionary Rule

Beginning in 1960, the Supreme Court rendered a series of decisions that substantially expanded the scope of the exclusionary rule. First, in *Elkins v. United States*,[45] the Court reexamined and rejected the "silver platter" doctrine established in *Weeks*; it held that federal courts could not admit evidence illegally seized by state officers. The opinion by Justice Stewart stated that the exclusionary rule "is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[46] Although acknowledging the absence of empirical statistics to demonstrate the rule's effectiveness in this regard, Justice Stewart observed that the rule had not produced untoward consequences in the federal system and that the movement among state courts toward exclusion seemed inexorable, and invoked considerations of federalism and the imperative of judicial integrity.

Then, in *Mapp v. Ohio*,[47] the Court overruled *Wolf* and held that evidence obtained by an illegal search and seizure is inadmissible in a state criminal trial.[48] The Court first disposed of the factual considerations relied on in *Wolf*, pointing out that more than half the states that had passed on the question after *Wolf* had wholly or partially adopted or adhered to the *Weeks* rule, and that the other remedies discussed in *Wolf* had proven "worthless and futile."[49]

In his opinion for the Court, Justice Clark advanced four justifications for imposing the exclusionary rule on the states. First, he said, the exclusionary rule is necessary to ensure the actual enjoyment of fourth amendment rights by—as explained in *Elkins*—removing the incentive to violate constitutional guarantees. Second, he argued, the close relationship between the fourth amendment and the fifth amendment's prohibition on coerced confessions requires exclusion of what is tantamount to co-

45. 364 U.S. 206 (1960).

46. *Id.* at 217.

47. 367 U.S. 643 (1961).

48. Prior to *Mapp*, illegally seized evidence was admissible in 24 states. *See Elkins*, 364 U.S. at 224-25 (Appendix to the Opinion of the Court). Since then, as a result of *Mapp*, all of these states have been compelled to exclude evidence obtained in violation of the fourth amendment. While some of these states would probably have adopted the exclusionary rule in any event, it seems likely that others would not have done so. *See e.g.*, State v. Hill, 245 S.C. 76, 138 S.E.2d 829 (1964) (adhering to *Mapp* only with express reluctance).

49. 367 U.S. at 651-52.

erced testimony—unconstitutionally seized goods, papers, effects, or documents. Third, Justice Clark claimed that application of the exclusionary rule to the states would promote federal-state cooperation in solving crime in accordance with constitutional standards. Finally, he argued that the imperative of judicial integrity required application of the rule to the states.

Two years after *Mapp*, the Court extended the exclusionary rule to verbal statements that are the "fruits" of an unlawful search.[50] Then, in 1965, the Court held that the rule should be applied in forfeiture proceedings.[51] The latter case represents the high-water mark of the exclusionary rule. Thereafter, the Court began to narrow its application by placing ever increasing emphasis on the rule's deterrent purpose as opposed to other justifications that had been offered for it, and by balancing its apparent costs against its presumed benefits.

G. Limitations On The Reach Of The Exclusionary Rule

In *Linkletter v. Walker*,[52] the Court decided that *Mapp* should not be applied retroactively because retroactivity would not serve the rule's deterrent purpose and would impose significant costs on the administration of justice.

In almost every case concerning the scope of the exclusionary rule since *Linkletter*, the Court has been guided by considerations of deterrence and has employed a balancing approach in deciding whether to apply the exclusionary rule. Thus, in *Alderman v. United States*,[53] the Court stressed the deterrence rationale, but indicated that the fourth amendment does not mandate every measure that deters illegal searches. Adopting a balancing approach, the Court concluded that the public interest in having all relevant and probative evidence submitted to the factfinder outweighed whatever additional deterrence would result from extending the protection of the exclusionary rule to defendants whose rights had not been violated by the unlawful search.

Five years later, in *United States v. Calandra*,[54] the Court took the same approach in refusing to require exclusion of unlawfully obtained evidence from grand jury proceedings. Con-

50. *See* Wong Sun v. United States, 371 U.S. 471 (1963).
51. *See* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965).
52. 381 U.S. 618 (1965).
53. 394 U.S. 165 (1969).
54. 414 U.S. 338 (1974).

struing the exclusionary rule not as a personal constitutional right but rather as a judicial remedy created principally to deter unlawful police conduct, the Court balanced the potential injury to the role of the grand jury against the marginal deterrence to be gained by applying the rule to grand jury proceedings, and concluded that such an extension of the rule was not warranted.

Similar reasoning in subsequent cases resulted in decisions that the exclusionary rule does not prevent the use of illegally obtained evidence in a variety of other contexts: to impeach testimony by a criminal defendant on cross-examination;[55] in civil proceedings to collect federal wagering taxes;[56] or in civil deportation proceedings.[57] *Stone v. Powell*[58] applied this balancing approach to determine that the rule does not provide a basis for granting federal habeas corpus relief to a state prisoner who had ample opportunity to litigate his fourth amendment claim in the state courts.

H. Good Faith Reliance Upon A Warrant

Until 1984, most of the Court's decisions limiting the scope of the exclusionary rule involved the admissibility of illegally seized evidence in proceedings collateral to the criminal prosecution itself; none concerned the paradigmatic exclusionary rule case of use of such evidence in the prosecutor's case-in-chief against the victim of the fourth amendment violation. *United States v. Leon*[59] and *Massachusetts v. Sheppard*[60] presented two such cases. In *Leon*, the Court held that the exclusionary rule does not bar use in the government's direct case of evidence seized by law enforcement officers acting in objectively reasonable reliance on a search warrant issued by a detached and neutral magistrate but subsequently found to be unsupported by probable cause.[61]

The linchpin of the *Leon* decision is the Court's analysis of the costs and benefits of applying the exclusionary rule under

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55. United States v. Havens, 446 U.S. 620 (1980).
56. United States v. Janis, 428 U.S. 433 (1976).
57. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).
58. 428 U.S. 465 (1976).
59. 468 U.S. 897 (1984).
60. 468 U.S. 981 (1984).
61. Having decided this issue in *Leon*, the only question for the Court in *Sheppard* was whether the officers reasonably believed that the search they conducted was authorized by a valid warrant. The Court concluded that "the police conduct in this case clearly was objectively reasonable and largely error-free." 468 U.S. at 990.

the circumstances presented. The "substantial social costs" cited by the court were the rule's interference with the truthfinding functions of judge and jury, the consequent freeing or unduly lenient treatment of guilty defendants, and the resultant generation of disrespect for the law and the administration of justice.[62] With respect to benefits, the Court rejected the argument that exclusion of evidence seized pursuant to a warrant would significantly deter errors by issuing judges and magistrates, and said that, instead, if exclusion of such evidence is to have any deterrent effect, "it must alter the behavior of individual law enforcement officers or the policies of their departments."[63] Turning then to situations in which officers have relied on a warrant obtained in objective good faith, the Court noted that "[i]n most such cases, there is no police illegality and thus nothing to deter . . . . Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations."[64] Thus, the Court concluded, "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion."[65]

I. INS v. Lopez-Mendoza

On the same day it adopted a "good faith" exception to the exclusionary rule for warrant cases in *Leon*, the Court decided in *INS v. Lopez-Mendoza*[66] that the fruits of illegal searches and seizures by INS agents are admissible in civil deportation proceedings. The Court reached this conclusion on the basis of the usual cost-benefit analysis.

On the cost side of the ledger, the Court adverted generally to "the loss of often probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs,"[67] as well as to the "unusual and significant" costs of applying the rule in deportation proceedings—the release from custody of persons who would then immediately resume their commission of the crime of unlawful

62. 468 U.S. at 907-08.
63. *Id.* at 916-18.
64. *Id.* at 920-21.
65. *Id.* at 922.
66. 468 U.S. 1032 (1984).
67. *Id.* at 1041.

presence in the United States, and the burdens that the rule would impose on the administration of the immigration laws.[68]

With respect to benefits, the Court pointed to several factors that it said reduced significantly the likely deterrent effect of exclusion in the context presented.[69] Noting that "[d]eterrence must be measured at the margin,"[70] the Court concluded that the balance between costs and benefits weighed against application of the exclusionary rule in civil deportation hearings, particularly in light of the "sensible and reasonable steps [already taken by the INS] to deter Fourth Amendment violations by its officers" and because application of the exclusionary rule would lead to continuing criminal conduct on the part of illegal aliens.[71]

J. Current Status Of The Exclusionary Rule

The current status of the exclusionary rule in federal law can best be described as precarious. All but one of the four theoretical pillars once used to justify the rule have been eroded, the validity of the sole remaining justification has been cast in doubt, and serious efforts are underway in Congress to limit the rule substantially, if not to abandon it entirely.

By 1965, when the exclusionary rule was in its heyday, the Court had suggested four principal bases for the rule: (1) the relationship between the fourth and fifth amendments (*e.g.*, *Boyd*); (2) the fourth amendment itself (*e.g.*, *Weeks*, *Wolf*); (3) the imperative of judicial integrity (*e.g.*, *Elkins*, *Mapp*); and (4) the necessity of deterring illegal police activity (*e.g.*, *Elkins*, *Mapp*). Beginning with *Linkletter* in 1965, however, the Court's exclusionary rule decisions placed increasing emphasis on the

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68. *Id.* at 1046-50.

69. The deterrence-reducing factors cited by the Court were: first, the weakness of the threat of exclusion on the conduct of INS agents, since deportation would still often be possible on the basis of untainted evidence; second, the improbability that the arresting officer would "shape his conduct in anticipation of the exclusion of evidence at a formal deportation hearing," because most illegal aliens arrested by the INS do not contest deportation; third, the existence within the INS of a "comprehensive scheme for deterring Fourth Amendment violations by its officers," involving "rules restricting stop, interrogation, and arrest practices," "instruction and examination in Fourth Amendment law," and "a procedure for investigating and punishing immigration officers who commit Fourth Amendment violations"; and, fourth, the availability of alternative remedies—principally, suits for declaratory relief—for institutional practices by the INS that might violate fourth amendment rights. *Id.* at 1043-45.

70. *Id.* at 1045.

71. *Id.* at 1050.

deterrence rationale. Moreover, by the mid-1970s, the Court had rejected the theory that exclusion is a personal constitutional right,[72] and had come to view deterrence as "the 'prime purpose' of the rule, if not the sole one."[73] If there could be any doubt that the deterrence rationale had supplanted the rule's other justifications, that doubt was removed in *Leon*.[74]

However, the Court has recognized for some time that the deterrence rationale is a weak reed. It noted in *Janis* that "[n]o empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect even in the situations in which it is now applied."[75] The Court reiterated this reservation in *Leon* as a prelude to its conclusion that "even assuming that the rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity."[76] Although the Court's holding in *Leon* was limited to searches conducted pursuant to warrants and, therefore, was not as broad as this language would seem to permit, this passage and other aspects of the *Leon* decision strongly suggest that the Court may be inclined to extend the "reasonable good faith mistake" doctrine to warrantless searches as well.

A second reason for questioning the vitality of the deterrence rationale relates to the "benefit" side of the cost-benefit analysis that the Court has adopted in deciding whether to apply the exclusionary rule in various contexts—including the context of use of unlawfully seized evidence in the government's case-in-chief, as in *Leon*. On at least two occasions, most recently in *Leon*, the Court has intimated that—even with respect to substantial and deliberate violations of the fourth amendment—its failure to question the continued application of the exclusionary rule is contingent on "the absence of a more efficacious sanction."[77]

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72. *See* United States v. Calandra, 414 U.S. 338 (1974).

73. *See* United States v. Janis, 428 U.S. 433, 446 (1976) (quoting from *Calandra*, 414 U.S. at 347).

74. *See* 468 U.S. at 905-06, 921-22 n.22 (1984) (rejecting the idea that the rule is either a necessary corollary of the fourth amendment or is required by the conjunction of the fourth and fifth amendments, and stating that the issue of judicial integrity is subsumed in the inquiry into whether exclusion would serve a deterrent purpose).

75. 428 U.S. at 452 n.22.

76. 468 U.S. at 918-19.

77. *See* Franks v. Delaware, 438 U.S. 154, 171 (1978); *Leon*, 468 U.S. at 912; *see also* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 421 (1971) (Burger, C.J., dissenting) ("I see no insuperable obstacle to the elimination of

These statements, together with decisions employing a balancing analysis and refusing to extend the rule to situations in which its deterrent purpose would be served only marginally or not at all, make it clear that the important question for the Court is not whether the rule deters fourth amendment violations at all, but whether it can reasonably be expected to provide sufficient deterrence to warrant incurring its substantial social costs. In this regard, the Court's discussion in *Lopez-Mendoza* of the reasons why the exclusionary rule's deterrent value is significantly reduced in the context of civil deportation proceedings is particularly instructive. The deterrence-reducing factors cited by the Court were: the ability to establish grounds for deportation despite the exclusion of unlawfully obtained evidence; the remote likelihood that any particular arrestee would challenge the lawfulness of his arrest; the availability of alternative remedies for INS practices that might violate the fourth amendment; and—most important—the existence within the INS itself of a comprehensive scheme for deterring fourth amendment violations. Each of these factors, but particularly the last two, would seem to apply with almost equal force to criminal cases and could, therefore, be used to justify a decision not to apply the exclusionary rule in other areas of the federal system beyond the immigration context.

Portentous though *Lopez-Mendoza* may be in this respect, the case sounds an even more ominous note for the future of the exclusionary rule. In the concluding passage of its opinion, the Court quoted approvingly from *Janis*:[78] "There comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches."[79] The implications of this statement are intriguing. To the extent that it suggests that the federal exclusionary rule of *Weeks* constitutes a mere exercise of the Court's supervisory power, it casts serious doubt on the propriety of continuing to apply the rule to the states.[80] And, even if the Court was not signaling an inclination to overrule *Mapp*, it did appear once again to be inviting either legislative repeal of the exclusionary rule or other action by Congress and the Executive Branch that would obviate the rule.

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the suppression doctrine if Congress would provide some meaningful and effective remedy against unlawful conduct by government officials.").

78. 428 U.S. at 459.

79. *Lopez-Mendoza*, 468 U.S. at 1050.

80. *See infra* Part II.C.

Although such invitations have not been accepted by the Congress, neither have they gone unheeded. During the 98th Congress, the Senate passed a bill to create a "reasonable, good faith" exception to the exclusionary rule in federal prosecutions. Substantially similar legislation is now pending in the Senate Judiciary Committee, a majority of which previously indicated its preference for even more substantial limitations on the scope of the rule.[81] The leadership of the House Judiciary Committee has long opposed any change in the exclusionary rule; consequently, the full House has not had an opportunity to address the issue, even though there is reason to hope that it might favor some restriction—if not abolition—of the rule. On the other hand, both the House and the Senate have given consideration in recent years to a number of proposals for creating new civil remedies that, if adopted, might provide a justification for abandoning the rule. However, neither body demonstrated an interest in pursuing such proposals during the first session of the 99th Congress.

II. ARGUMENTS FOR AND AGAINST THE EXCLUSIONARY RULE

As suggested above, arguments for and against the exclusionary rule comprehend many issues. However, most of these arguments relate to the two principal justifications now advanced in support of the rule: the "imperative of judicial integrity" and the deterrence of police misconduct. Recent Supreme Court opinions have focused increasingly on the deterrence rationale. The *Leon* opinion justified the creation of a "good faith" exception almost totally with reference to deterrence, which the majority now clearly sees as the *raison d'etre* of the exclusionary rule.[82]

Although the argument over deterrence now dominates much of the debate over the exclusionary rule, a consideration of the "integrity" rationale must still be part of any thorough discussion of the rule. As faith in the deterrence value of the rule has eroded, defenders of the exclusionary rule have begun to shift their support of the rule away from the "empirical" question of deterrence and toward defending it mainly on the basis of "principle".[83]

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81. *See* S. Rep. No. 350, 98th Cong., 2d Sess. 3 (1984).
82. *See supra* notes 52-74 and accompanying text.
83. *See, e.g.*, Kamisar, *supra* note 21, at 581-97.

This section, in Parts A and B, primarily discusses arguments for and against the integrity and deterrence rationales advanced in support of the exclusionary rule, and mentions briefly several secondary arguments for and against it. Part C examines whether, in light of the Supreme Court's abandonment of the idea that the rule is required by the Constitution, there exists any basis for its application to the states.

A. Arguments For The Exclusionary Rule

1. The Exclusionary Rule Preserves Judicial Integrity

Arguments supporting the exclusionary rule on grounds of "principle" hold that the exclusion of evidence obtained in violation of the fourth amendment is either a necessary or natural consequence of the constitutional prohibition against unreasonable searches and seizures.[84] This idea has been expressed in various formulations. In *Silverthorne Lumber Co. v. United States*, Justice Holmes wrote that "the essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[85]

In *Mapp*, the Court quoted *Elkins v. United States*, to the effect that protecting the purity of the judicial process was a paramount justification for the rule: " '[T]here is another consideration—the imperative of judicial integrity.' The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."[86]

The *Leon* dissenters observed that "seizures are executed principally to secure evidence, and because such evidence generally has utility in our legal system only in the context of a trial supervised by a judge, it is apparent that the admission of illegally seized evidence implicates the same constitutional concerns as the initial seizure of that evidence."[87] Proponents of the judicial integrity justification argue that when the state seeks to use evidence obtained in violation of the fourth amendment it im-

84. *Id.*
85. 251 U.S. 385, 392 (1920).
86. 367 U.S. at 659 (quoting 364 U.S. at 222).
87. 468 U.S. at 933.

plicitly ratifies or approves the conduct by which the evidence was procured. A court that accepts such evidence is itself an accessory to the constitutional violation. Conversely, a court that excludes the tainted evidence precludes the state, and by implication the court itself, from "receiving stolen goods" and thereby becoming a party to the crime.[88]

Although espoused as an argument of "principle" standing above utilitarian considerations, the "judicial integrity" argument is in a sense grounded in ultimate cost-benefit considerations. The assumption is that for the constitutional system to survive the officers of the state must behave ethically. The courts help ensure the survival of the system by paying the "price" of allowing some criminals to go free. The imposition of the exclusionary rule has accordingly been justified by the Supreme Court, at least with respect to the federal courts, as an exercise of the Court's supervisory power over the judiciary.

However, whatever the merits of grounding the exclusionary rule on "principle," the majority of justices have in recent years clearly rejected that rationale and have evaluated the exclusionary rule in terms of deterrence.[89] Arguments based on "principle" have appeared almost exclusively in the opinions of the dissenters.[90]

2. *The Exclusionary Rule Deters Police Misconduct*

For many years prior to *Mapp* there had been a vigorous debate over whether the exclusionary rule did, or could, deter police misconduct. The most remarkable aspect of this debate was the almost complete lack of statistical or empirical support for either side. Nevertheless, state courts that adopted the rule, and eventually the Supreme Court, spoke of the deterrent value of the exclusionary rule as if it were beyond question.[91]

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88. *See, e.g.*, Goldstein v. United States, 316 U.S. 114, 128 (1942) ("[T]his Court has refused to make itself a participant in lawless conduct by sanctioning the use in open court of evidence illegally secured.") (Murphy, J., dissenting).

89. *See supra* notes 52-74 and accompanying text.

90. *See, e.g., Leon*, 468 U.S. at 943 (Marshall, J., dissenting) ("Rather than seeking to give effect to the liberties secured by the fourth amendment through guesswork about deterrence, the Court should restore to its proper place the principle . . . that an individual whose privacy has been invaded . . . has a right grounded in that amendment to prevent the government from subsequently making use of any evidence so obtained.").

91. For a summary of empirical research regarding the exclusionary rule up to the mid-1970s, see Comment, *Trends in Legal Commentary on the Exclusionary Rule*, 65 J. CRIM. L. & CRIMINOLOGY 373 (1974).

In recent years, the deterrence debate has grown more sophisticated. There are at least three separate types of deterrence discussed in the literature. The first type, "special deterrence," refers to the likelihood that a police officer who has had evidence he seized suppressed will be dissuaded from transgressing fourth amendment standards again. The second type, called "general deterrence," refers to the deterrent effect of the rule on law enforcement officials who are made more aware of fourth amendment rights and persuaded not to violate them because of the experiences others have had with exclusion. This kind of deterrence concerns the educative effect of the rule. A third type is usually called "systematic" deterrence. This focuses on the idea that it is not just the police but the entire justice system that must be deterred from violating fourth amendment rights. Instead of focusing on the police directly, this perspective includes the belief that the loss of convictions will lead magistrates, prosecutors, and state officials generally to modify police education, training, and discipline to decrease fourth amendment violations and thereby increase the quantum of admissible evidence.[92] The particulars of this debate on deterrence are discussed more fully below in the succeeding section on arguments against the exclusionary rule.[93]

B. Arguments Against The Exclusionary Rule

There are a number of arguments against the exclusionary rule. Several go to its effect on the "integrity" of the criminal justice system. Others question its deterrent value. Finally, there are arguments concerning its harmful effects, and suggestions

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92. As the *Leon* dissenters argued: "[T]he deterrence rationale for the rule is not designed to be, nor should it be thought of as, a form of "punishment" of individual police officers for their failures to obey the restraints imposed by the fourth amendment. Instead, the chief deterrent function of the rule is its tendency to promote institutional compliance with fourth amendment requirements on the part of law-enforcement agencies generally." 468 U.S. at 953 (citation and footnote omitted).

93. In addition to the two primary arguments supporting the exclusionary rule, there are several secondary arguments. It is widely believed that the existence of the exclusionary rule contributes to the development of fourth amendment law by encouraging the litigation of search and seizure issues. The possibility of evidence suppression, and consequent release of the accused, is thought to encourage defendants to press such claims.

Moreover, it is claimed, under the current regime courts are encouraged to constantly re-examine the definitions of probable cause, privacy, and the reasonableness of police conduct. There is also an argument that the exclusionary rule fosters a higher level of police performance—forcing policemen to abide by fourth amendment standards may lead to their doing a better and more thorough job of investigation and preparation.

that there are constitutionally and socially acceptable alternatives.

1. The Exclusionary Rule Releases Dangerous Criminals, Encourages Plea Bargains, and Discourages Prosecution

The most obvious objection to the exclusionary rule is that it prevents the conviction of criminals. At one level there are the notorious cases in which those guilty of serious crimes are released because essential evidence is suppressed.[94] The overall impact on convictions is less clear. While it is difficult to quantify the number of convictions lost, several studies suggest the total is not insignificant.

A 1982 National Institute of Justice study of the effects of the exclusionary rule in California found a significant impact on the rate of conviction. According to the study, 4.8% of over 4,000 felony cases rejected for prosecution were declined by prosecutors because of search and seizure problems. The effect of the exclusionary rule on drug cases was even more pronounced. Approximately 30% of all felony drug cases were declined by prosecutors because of search and seizure problems.[95]

However, the conclusion that the exclusionary rule has a significant statistical impact on prosecutions is not universally accepted. A 1979 General Accounting Office study found a case declination rate by prosecutors of only 0.4%.[96] This study also found that for cases in which a suppression motion was granted in whole or in part the conviction rate was approximately 50%. However, the study found that suppression motions succeeded in only 1.3% of all prosecuted cases.

There is some consensus that the exclusionary rule "costs" the state only a small percentage of the total of all possible felony prosecutions, but this does not answer the question of what constitutes a "significant impact." A small percentage of all such cases is a very substantial number in absolute terms. Losing that many convictions certainly poses serious dangers to the commu-

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94. Appendix B contains selected examples of such cases.

95. NATIONAL INSTITUTE OF JUSTICE, U.S. DEPT. OF JUSTICE, *The Effects of the Exclusionary Rule: A Study in California* (1982). *But see* Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of 'Lost' Arrests*, AM. B. FOUND. RES. J. 611 (1983) (NIJ study data interpreted to support the conclusion that prosecutors reject only .8% of all felony arrests and only 2.4% of all felony drug arrests because of search and seizure difficulties).

96. REPORT OF THE COMPTROLLER GENERAL OF THE UNITED STATES, *Impact of the Exclusionary Rule on Federal Criminal Prosecutions* (1979).

nity, and there is evidence that the number of lost convictions is concentrated particularly among certain crimes generally perceived as serious, e.g., weapons and drug offenses. Nor do percentages reflect the "cost" of public anger, and the heightened fear of crime, that may result from the release or truncated prosecution of serious criminals even in a small number of cases.

The loss of evidence at trial is not the only price the state pays for continuation of the exclusionary rule. The rule may distort the criminal justice system by tipping the balance in favor of the accused. Prosecutors who anticipate losing cases at trial on "technicalities", or who find police conduct in given cases to fall within a "gray area," may be willing to trade reduced charges for a guilty plea. Or they may simply choose not to go forward in cases where there is a significant chance that essential evidence will be excluded.[97]

2. *The Exclusionary Rule Excludes the Most Reliable Evidence and Undermines the "Truth-seeking" Function of the Criminal Justice Process*

A particular problem with the exclusionary rule is that it often excludes the most credible evidence of crime, namely physical evidence within the possession or control of the defendant. In the words of the current Director of the Department's Bureau of Justice Statistics, Steven R. Schlesinger, the exclusionary rule is

> qualitatively different from other types of exclusion such as suppression of unreliable confessions, line-up evidence, or eyewitness identification, for in these areas suppression takes place because of specific doubts as to the reliability of the evidence.[98]

The exclusionary rule thus interferes with the truth-finding function of the law in a way that other rules governing suppression, which concern the credibility of evidence, do not.

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97. *See, e.g.*, Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 56, 80-82 (1968).

98. Schlesinger, *Excluding the Exclusionary Rule*, in CRIMINAL JUSTICE REFORM: A BLUEPRINT 121 (P. McGuigan & R. Rader eds. 1983).

3. *The Exclusionary Rule Diminishes Respect for the Entire System of Justice*

To the extent that the preservation of the integrity of the courts and the criminal justice system as a whole is a fundamental purpose of suppression of reliable evidence, the exclusionary rule may actually work against it. Studies indicate that there is a widespread public perception that criminals are allowed to get off through "loopholes" and "technicalities," and that the courts are to blame. Public respect for the courts and for the criminal justice system suffers as a result of this departure from the truth-seeking function.[99]

4. *The Exclusionary Rule Provides No Remedy for the Innocent*

In one sense, the exclusionary rule vindicates only the rights of criminals, i.e., persons who otherwise would probably be convicted. While the fourth amendment's protections against unreasonable searches and seizures belong to all, the exclusionary rule provides relief only to those persons accused of a crime from whom contraband or other incriminating evidence is obtained. People whose rights of privacy are violated, but who are not prosecuted, are afforded no remedy by the exclusionary rule.[100] The exclusionary rule thus operates differently from enforcement mechanisms for other constitutional provisions, such as the right to jury trial or the assistance of counsel, which are concerned with the truthfinding function of the law and thereby protect the innocent as well as the guilty.

5. *The Exclusionary Rule May Not Significantly Deter Police Misconduct*

At the heart of the current debate over the exclusionary rule is the issue of whether it does in fact deter police misconduct.

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99. The number of respondents in Lou Harris and Associates polls who believed that courts are "too easy" on criminals jumped from 52% in 1967 to 83% in 1981. *See Opinion Roundup, Pub. Opinion*, Aug.-Sept. 1982, at 26.

100. *See, e.g.*, Goodpaster, *An Essay on Ending the Exclusionary Rule*, 33 HAST. L.J. 1065, 1084 (1982).

The importance of this issue was demonstrated by the majority opinion in *Leon*. In *Leon*, the Supreme Court majority concluded that there should be a "good faith" exception to the exclusionary rule, at least for searches conducted with warrants, because the rule could not be thought to deter police officers who violated the fourth amendment, but who acted in the reasonable, good-faith belief that they had complied with the constitutional predicates to a valid search.

One of the most prominent attacks on the deterrent value of the exclusionary rule has been mounted by Professor Dallin Oaks. Oaks believes that the rule acts neither as an effective special nor general deterrent.[101]

With respect to special deterrence, Oaks and other commentators have observed that the exclusionary rule has a negligible deterrent effect on the transgressing officer because it does not punish him directly. Instead, the exclusion of evidence sanction is imposed most directly upon the prosecutor, who loses the ability to use the evidence in the case-in-chief against the accused. Moreover, delays in the criminal justice process and the lack of communication between prosecutors and arresting officers are such that policemen often do not know that a "bust" was lost because of their failure to abide by fourth amendment requirements. Many policemen believe that convictions are lost by prosecutors or judges for reasons unrelated to the exclusionary rule, and thus have no incentive to modify their behavior. Overall, Oaks suggests, the current system may tend to reward and punish police officers more on the basis of their performance in areas such as arrest and the seizure of evidence than on whether the fruits of their labors result in convictions. With respect to general deterrence, Oaks argues that the value systems of the police are not receptive to constitutional concerns. Moreover, the ever-changing rules governing the fourth amendment are complex, and difficult for police to comprehend and follow. The fact that such rules may not be communicated clearly to police compounds the problem.

The question of systematic deterrence was not addressed specifically by Oaks. However, there does seem to be little question that many police departments have modified their institutional practices as a result of *Mapp* and its progeny. Professional departments now provide training and education to officers to make them fully aware of warrant requirements and the prereq-

101. *See generally* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

uisites for a valid warrantless search.[102] What is more difficult to determine is the extent to which such reforms have affected actual police behavior or the number of fourth amendment violations.

Ultimately, the deterrent value of the rule is a question for empirical examination.[103] However, any comparison of deterrence is of limited value if it only compares the exclusionary rule to having no enforcement mechanism, and leaves out the possibility of achieving as much or more deterrence through the adoption of one of the alternatives to the exclusionary rule.

6. *The Exclusionary Rule May Encourage Police and Judicial Misconduct*

Several authorities have speculated that the exclusionary rule may work to encourage a variety of police and judicial misconduct. Officers who learn that their searches were improper only after the fact are encouraged to lie about the circumstances under which the evidence was obtained, even to the point of perjuring themselves, to save the evidence.[104]

Moreover, fear of the exclusionary rule may encourage the police to employ a variety of tactics designed to combat crime which may violate the fourth amendment but which are not subject to the rule. Police may use harassing tactics—such as frequent raids, or repeated arrest and release—which take contraband off the streets and reduce certain criminal activities by imposing a high "cost" on participation in the criminal activity, but which stop short of employing the steps of the justice system at which the exclusionary rule would be invoked. The net effect may, therefore, be an increase in fourth amendment violations as police attempt to work around the rule.[105]

Related to these problems, as well as to the problem of judicial tinkering with probable cause discussed below, is the problem of judges "looking the other way" on police and magistrate misconduct. Because the price of suppressing evidence is so

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102. *See, e.g.*, Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 399-400 (1981).

103. *See supra* Part II.A.2.

104. *See* Oaks, *supra* note 101, at 739-40.

105. *See* Goodpaster, *supra* note 100, at 1090-91; Oaks, *supra* note 101, at 720-24 (much police enforcement activity is not subject to the rule); *see also* Wilkey, *Why Suppress Valid Evidence?*, 62 JUDICATURE 215, 355-56 (1978).

high, some judges may be willing to accept outrageous police stories of how evidence was obtained, or ignore complaints about warrant defects or the conduct of investigations, to keep evidence in. If the courts were able to review and sanction police conduct, and assess the adequacy of warrants, in a forum distinct from the prosecution of the accused, they would probably be far more exacting in their review.[106]

7. The Exclusionary Rule May Undercut the Fourth Amendment by Encouraging Judges to Lower the Threshold of Probable Cause

A number of commentators have argued that the exclusionary rule encourages judges to lower the threshold of probable cause. Because judges are sensitive to the problem of allowing criminals to go free, they have an incentive to find that the basis for police action was sufficient. The quantum of evidence necessary to constitute probable cause falls ever lower as precedents accumulate. More searches may be conducted without a warrant, and the requirements for getting a warrant become less stringent. If there were an alternative to the exclusionary rule that penalized police misconduct, but that did not require evidence suppression, judges might be more willing to hold police to a higher standard of probable cause, and the interests of the fourth amendment might thereby be better served.[107]

8. The Continuation of the Exclusionary Rule Discourages the Search for Alternatives

The existence of the exclusionary rule may discourage the development of superior alternatives. Although the Chief Justice and others have invited Congress and the states to develop other approaches, and have indicated that the Supreme Court might give up the exclusionary rule once effective alternatives were in place, the incentive for finding such replacements may be inhibited by the existence of the rule, as it gives the impression that the Supreme Court has preempted the field.[108]

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106. *See* Goodpaster, *supra* note 100, at 1090-91.

107. *See, e.g.*, Schlesinger, *supra* note 98, at 122-23.

108. *See, e.g.*, Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361, 1385 (1981).

9. *The Exclusionary Rule Distorts the Allocation of Judicial and Criminal Justice Resources*

The cost in time and resources expended in considering and disposing of suppression motions may be considerable. One study found thirty-four percent of all court time in one Chicago narcotics court to be spent on hearing motions to suppress.[109] In addition to the time of trial courts, there is the time spent by prosecutors screening cases for exclusionary rule problems and defending against suppression motions, and the time spent by appellate courts in reviewing suppression decisions on direct review and on collateral attack. Given the reality of necessarily limited judicial and criminal justice resources, the justice system might be better served—and fourth amendment rights better protected—by an alternative that examines and sanctions search and seizure violations outside the prosecutorial process.

C. To The Extent The Exclusionary Rule Is Not Constitutionally Required, There Is No Principled Basis For Its Application To The States

As discussed above, the Supreme Court's justification of the exclusionary rule has narrowed considerably. In *Mapp*, the Court described the rule as "constitutionally necessary."[110] But other Supreme Court opinions have generally not held that exclusion is a constitutional command of the fourth amendment itself.[111] Indeed, in *United States v. Calandra*, Justice Powell wrote for the Court that "the [exclusionary] rule is a judicially-created remedy designed to safeguard fourth amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[112] This characterization was adopted and amplified by the majority in *Leon*, which expressly rejected "[l]anguage in opinions of this Court and of individual Justices [that] has sometimes implied that the exclusionary rule is a necessary corollary of the Fourth Amend-

109. *See* Oaks, *supra* note 101, at 744-45. Additionally, based upon the GAO finding that suppression motions succeed in only 1.3% of prosecuted cases, there are 77 unmeritorious suppression motions for every meritorious motion, indicating a significant consumption of judicial resources. *See supra* note 96 and accompanying text.

110. 367 U.S. 643, 656.

111. In *Wolf v. Colorado*, 338 U.S. 25 (1949), the majority rejected the idea that the exclusionary rule was an inherent part of the fourth amendment. *Id.* at 37-48.

112. 414 U.S. at 347-48.

ment."[113] The Court similarly rejected the *Mapp* rationales that the rule was compelled "by the conjunction of the Fourth and Fifth Amendments,"[114] or by the fifth amendment.[115] Moreover, in *Lopez-Mendoza*, the Court, in an opinion verging on an endorsement of an ad hoc approach to applying the exclusionary rule based on a balancing of deterrence versus "costs," quoted *United States v. Janis*[116] in dicta as follows:

> There comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a *supervisory role* that is properly the duty of the Executive and Legislative Branches.

This re-characterization of the basis of the exclusionary rule is fraught with doctrinal implications which have not yet been fully explored by the Court. Among these is the question of how the Supreme Court can possibly justify continued application of the rule against the states.

Now that the Court has indicated in *Janis* and *Leon* that the rule is an exercise of "supervisory power," it is not clear what basis exists for the judicial application of the rule to the state courts. The Supreme Court has never overtly asserted or defended the proposition that it possesses the authority to exclude evidence in a case in which the state court itself would not violate the Constitution by admitting it, and it is difficult to see what constitutional authority the Court could point to as the basis for the assumption of such power.

There is another, fundamental issue, not addressed here, concerning what power the federal courts have to prescribe such "prophylactic" rules for any level of government. The Supreme Court has claimed a supervisory power to prescribe non-constitutional rules of evidence for Article III courts, but both the source and the scope of this power are unclear.[117]

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113. 468 U.S. at 905-06. To be sure, dissenting justices continue to espouse the *Mapp* view that exclusion is required by the Constitution. For example, Justice Brennan, dissenting in *Leon*, argued that "The Amendment therefore must be read to condemn not only the initial unconstitutional invasion of privacy—which is done, after all, for the purpose of securing evidence—but also the subsequent use of any evidence so obtained." 468 U.S. at 934.

114. *Id.* at 905-06.

115. *Id.*

116. 428 U.S. at 459 (emphasis supplied).

117. *See infra* note 213.

In any event, because the Court considers the propriety of applying the exclusionary rule "in a particular case" to be "an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct,"[118] two consequences seem to follow as a matter of logic: first, the current broad application of the rule is objectionable as an unprincipled interference with state courts by the federal judiciary; second, the rule should at a minimum be returned to its status prior to *Mapp*, i.e., as a limitation on federal but not state action.

III. OTHER METHODS OF PREVENTING AND REDRESSING FOURTH AMENDMENT VIOLATIONS

As noted above, although deterrence of unreasonable searches and seizures is now widely accepted as the primary purpose of the exclusionary rule, the suppression of unlawfully seized evidence has remedial consequences as well—at least for those guilty persons who would otherwise be convicted on the basis of such evidence. However, the exclusionary rule is not the only device available in the federal system for deterring fourth amendment violations or redressing their consequences, and—in light of the substantial costs and dubious benefits of the suppression doctrine—other alternatives deserve careful attention.

This section begins by describing approaches that other civilized nations have taken to the problem of unlawful searches. The discussion then turns to various alternatives that currently exist, or that might be adopted, in this country to prevent or redress fourth amendment violations. These include the use of criminal prosecutions, equitable remedies, administrative practices, and civil damage suits, as well as reliance on a less expansive version of the exclusionary rule.

A. Foreign Responses And Approaches To Improperly Seized Evidence

While improper police conduct in obtaining evidence is not a problem unique to America, the systematic exclusion of evidence so obtained from the trial of the accused is. Other nations, including those with a common law legal tradition, have not

118. *Leon*, 468 U.S. at 906 (quoting Illinois v. Gates, 462 U.S. 213 (1983)).

adopted a response similar to the American exclusionary rule. The three systems described below—those of England, Canada, and West Germany—exemplify differing foreign approaches to the problem.

1. England

The English legal system is in many respects very similar to our own, but England takes a radically different approach to the question of how to treat illegally seized evidence. Put simply, the general rule is inclusion. As stated in a leading English case, "It matters not how you get it; if you steal it even, it would be admissible in evidence."[119]

English law distinguishes coerced confessions from physical evidence. Involuntary confessions are more readily subject to suppression because of their inherent unreliability. Physical evidence is presumptively admissible, and there is no exclusionary principle akin to the "fruit of the poisonous tree" doctrine enunciated in this country in *Silverthorne*.

Apart from involuntary confessions there are two general situations where an English judge has the *discretion* to suppress: (1) cases where the judge finds that inclusion would work a "hardship on the accused" relative to the gravity of the crime (for example, where the police obtain evidence through false representations, threats, or tricks); and (2) cases where evidence was obtained in violation of prescribed procedures for obtaining convictions for a specific statutory offense.

Overall, it appears that English judges rarely use their discretion to exclude relevant evidence. Conviction as a result of the prosecution's use of illegal evidence is not in itself deemed to be "unfair."

Deterrence in the English system is accomplished by several means. At one level, common-law remedies are available to the victim of an illegal search. An officer exceeding the terms of a warrant may be held liable as a trespasser in a civil suit. The primary deterrent mechanism, however, appears to be internal police force disciplinary procedures, which may include "fines, pay cuts, undesirable transfers, and removal from the force."[120]

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119. R. v. Leatham, 8 Cox C.C. 498 (Crompton, J.) (1861).

120. *See* Comment, *Comparative Analysis of the Exclusionary Rule and its Alternatives*, 57 TUL. L. REV. 648, 659-63 (1983).

2. *Canada*

Until recently Canada had a statutory, as opposed to a constitutional, bill of rights. The traditional Canadian system closely paralleled the English approach to the problem of illegally seized evidence. The preferred remedies in Canada included civil tort actions for damages and administrative discipline. Professor Oaks, who studied the Canadian experience, concluded that the tort action was a reasonably effective option for victims of an illegal search within the Canadian system. Canadian juries appeared sensitive to illegal police practices and were apt to give awards proportionate to the violations committed. An officer defending such an action was entitled to raise the defense that his conduct was justified either by a common-law rule or by statutory authorization. The Canadian Criminal Code protects an officer "if he acts on reasonable and probable cause grounds, is justified in doing what he is required or authorized to do and is using as much force as is necessary for that purpose." This provision has been applied to shield officers from civil as well as criminal liability.[121]

This approach changed when Canada adopted the "Constitution Act of 1981." This document sets forth in part I the "Canadian Charter of Rights and Freedoms." This charter is modelled in many respects on the American Bill of Rights. In section 8, the charter echoes the fourth amendment in its statement that "Everyone has the right to be secure against unreasonable search or seizure." Section 24 of the Charter provides for judicial review of violations of the Charter and further provides "that evidence [that] was obtained in any manner that infringed or denied any rights or freedoms guaranteed by this charter . . . shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."[122]

Remedies under the Charter are supplemental to pre-existing remedies. For example, the fact that a Canadian court may suppress evidence does not preclude the bringing of a tort action. As of this date the Canadian Supreme Court has decided only one

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121. *See* Oaks, *supra* note 101, at 702-05. However, Oaks' view is not universally shared. At least some Canadian legal scholars contend that the traditional remedies of civil actions and internal discipline did not constitute an effective deterrent to police misconduct, and that the inclusion of an exclusionary rule in the new Charter reflects this. *See infra* note 122.

122. Whittington, THE CANADIAN POLITICAL SYSTEM: ENVIRONMENT STRUCTURE AND PROCESS app. II (3d ed. 1981).

exclusion case. Canadian exclusionary rule law remains very much in its formative stage. Lower court decisions indicate that the Canadian courts will weigh a variety of factors, including the good faith of the officer and seriousness of the crime, in making their decisions.[123]

3. *Federal Republic of Germany*

In West Germany exclusion of evidence is rare. Generally, the German system has few fixed rules governing the admissibility of evidence, and evidence is suppressed only when deviation from prescribed standards is thought to jeopardize its reliability. The judge is given broad discretion to balance the importance of the evidence against the importance of protecting personal privacy against unwarranted intrusion. German authorities encourage citizen complaints about police misconduct. Police departments review allegations of misconduct administratively, and such administrative review is subject to governmental and judicial oversight. Officers may be fined, lose promotions, or even be imprisoned for misconduct. Civil actions by private citizens also provide a remedy.[124]

This "totality of the circumstances" approach, under which courts weigh such factors as the seriousness of police misconduct, the type of evidence seized, the degree of probable cause, and related factors, in deciding whether to suppress, is common to other European countries as well.[125]

B. *Criminal Prosecutions*

In this country, under certain circumstances, a law enforcement officer who conducts an unlawful search and seizure may be prosecuted for a criminal offense under federal or state law. Federal statutes that provide a basis for such a prosecution include the following provisions of Title XVIII: § 241 (conspiracy to violate constitutional rights), § 242 (deprivation of rights under color of law), § 2234 (exceeding authority in executing a

123. Information on recent Canadian experience was provided to the Office of Legal Policy by Professor William Van Veen of the University of Windsor in a telephone conference on January 17, 1986.

124. *See* Comment, *supra* note 120, at 666-69.

125. *See* Rader, *supra* note 17, at 1471; Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032 (1983).

search warrant), § 2235 (procuring a search warrant maliciously and without probable cause), and § 2236 (conducting a warrantless search not incident to arrest or without consent). Because all but the first of these offenses are misdemeanors, prosecutions can be undertaken without the concurrence of a grand jury. In addition, because a federal court may order restitution as part of the sentence for any federal offense,[126] criminal prosecutions for fourth amendment violations can have remedial as well as deterrent consequences.

For several reasons, however, criminal prosecution seems ill-suited as a routine sanction for fourth amendment violations. The effectiveness of criminal prosecution as a deterrent to fourth amendment violations depends, initially, on the willingness of prosecutors to lodge criminal charges against law enforcement officers. It is sometimes argued that it is unrealistic to rely on criminal prosecutions because prosecutors may be reluctant to charge fellow members of the law enforcement community, with whom they feel it necessary to maintain close working relationships.[127]

While this reluctance may be a factor in some situations, a more likely explanation for the dearth of criminal cases against law enforcement officers lies in the nature of most fourth amendment violations and the requirements of the criminal process. The great majority of unlawful searches and seizures—at least in the federal system—appear to involve mistakes of law or fact, rather than willful or malicious conduct, on the part of law enforcement officers. Thus, where the officers did not believe their conduct to be unlawful, prosecutors no doubt frequently conclude that prosecution would be inappropriate, given the requirement of proving criminal intent beyond a reasonable doubt.[128]

In short, criminal sanctions are not appropriate except in cases of particularly serious fourth amendment violations—those

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126. *See* 18 U.S.C. § 3663.

127. *See, e.g.*, Schroeder, *supra* note 108, at 1397.

128. Of course, not all fourth amendment violations are inadvertent. Even in the federal system, there occur from time to time deliberate and serious departures from accepted search and seizure norms. The United States has sought criminal penalties in the past. *See, e.g.*, United States v. Felt, 491 F. Supp. 179 (D.D.C. 1979), in which two senior FBI officials were convicted of conspiring to violate fourth amendment rights by conducting surreptitious entries into homes and other premises during a fugitive investigation. (The defendants were subsequently granted a presidential pardon.) However, convictions may still be difficult to come by, and, in any event, because they are so rarely warranted, criminal prosecutions occur too sporadically to be relied on as a sole deterrent.

in which law enforcement officers can be shown to have acted with criminal intent. Because such cases are extremely rare, and because the requirements of the criminal process are difficult to satisfy, a deterrent strategy cannot be based on the threat of criminal prosecution alone.

C. Administrative Practices

1. Existing Federal Practices

Federal law enforcement agencies have developed a variety of administrative mechanisms for preventing and punishing fourth amendment violations, as well as other unlawful or improper conduct on the part of agency personnel. These devices include: (1) comprehensive legal training, including initial and follow-up training in the law of search and seizure; (2) specific rules and regulations governing the conduct of employees, and the use of investigative techniques such as searches and seizures; (3) institutional arrangements for conducting internal investigations of alleged violations of the rules and regulations; and (4) disciplinary measures that may be imposed for unlawful or improper conduct.[129] In addition, former Attorney General Civiletti directed, as a matter of Departmental policy, that any evidence seized through intentionally unlawful conduct be excluded from the proceeding for which it was obtained.[130]

Among the various administrative steps taken by the federal government to prevent unlawful searches and seizures, the threat of disciplinary action deserves particular attention. A federal law enforcement officer who violates the fourth amendment—unless he acted in good faith—faces not only the prospect of criminal prosecution and a suit for damages by the aggrieved party, but also the threat of adverse administrative action by his superiors. For example, law enforcement officers in all components of the Department of Justice other than the FBI are subject to the disciplinary provisions of Department of Jus-

129. The point is illustrated, for example, by requirements and practices of the Immigration and Naturalization Service, which are referred to in INS v. Lopez-Mendoza, 468 U.S. 1032, 1044-45, and discussed more fully in the Brief for the Immigration and Naturalization Service in that case (No. 83-491) at 39-44. The rules and regulations of the Internal Revenue Service relating to electronic surveillance are discussed in United States v. Caceres, 440 U.S. 741 (1979).

130. *See* Memorandum from Benjamin R. Civiletti to Heads of Offices, Boards, Bureaus and Divisions, *Violations of Search and Seizure Law* (Jan. 16, 1981).

tice Order 1752.1A, dated April 27, 1981.[131] That order describes, and specifies the range of permissible disciplinary measures for, a number of "offenses" that may result in disciplinary action. Included are "offenses" involving intentional, reckless, and negligent violation of rules governing searches and seizures. Permissible disciplinary action depends on the nature of the violation and whether it is a first or subsequent transgression, and ranges from an official reprimand, to suspension for up to fifteen days, to removal from office.

Investigations of allegedly unlawful searches and seizures are conducted by the Department's Office of Professional Responsibility, as well as by similar internal inspection offices within the various components. The Office's records indicate that since Order 1752.1A went into effect, seven cases involving allegations of misconduct in connection with searches and seizures have been brought to its attention. In two of these cases, both involving the DEA, the allegations were determined by the courts in rulings on suppression motions to be unfounded. In four others, internal FBI investigations established that no misconduct had occurred and, after review, the Office concurred in those determinations. In the remaining case, the allegations were also found to be unsubstantiated, but the Office's records do not indicate by whom this finding was made. In short, since 1981 there has been no occasion to punish employees for violating the Department's search and seizure rules.[132]

2. *Proposed Review Boards*

A number of commentators have suggested establishing extrajudicial disciplinary procedures for dealing with fourth amendment violations by law enforcement officers.[133] To overcome the

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131. The FBI, which has traditionally been permitted to promulgate and enforce its own rules of conduct for its employees, has a comparable set of disciplinary rules and regulations. Under the FBI's Schedule of Disciplinary Offenses and Penalties, punishment for unlawful searches that are conducted negligently, recklessly, or intentionally may extend to removal in appropriate cases, even for the first offense. An FBI and grand jury investigation of the fourth amendment violations that led to the *Felt* prosecution, referred to in note 128 *supra*, resulted in the resignations of several FBI agents, as well as the dismissal of the agent in charge of the FBI's New York field office for testifying falsely before the grand jury.

132. However, 20 INS officers have been suspended or terminated for unspecified misconduct involving aliens. Brief for the Immigration and Naturalization Service, *Lopez-Mendoza* (No. 83-491).

133. *See, e.g.*, Hudson, *Police Review Boards and Police Accountability*, 36 LAW & CONTEMP. PROBS. 515 (1971).

reluctance of prosecutors to pursue sanctions against officers with whom they need to maintain a good working relationship, and because police supervisors may lack sufficient incentive to punish officers, these proposals usually suggest that discipline be meted out by an independent review board of some kind.

A detailed proposal of this type has been advocated by Professor Schlesinger as part of an overall plan he has outlined as an alternative to the exclusionary rule.[134] Under Schlesinger's proposal, an independent board comprised of private citizens and public officials would handle accusations of police misconduct in cases referred by a trial judge when the judge believes there to have been illegal police behavior. A hearing would be held before the board, at which the accused officer or officers would be represented by counsel, and the victim of the alleged violation would be represented by a special counsel operating independently of the prosecutor's office. The board would take into account the nature and severity of the constitutional transgression, as well as any affirmative defenses raised by the officer, including the claim that he acted in good faith. The board would then decide what punishment or discipline, if any, was appropriate. In serious cases it might refer the case to the prosecutor for the initiation of criminal prosecution.

D. Injunctions And Mandamus

It might be possible in some instances to employ court injunctions to stop systematic abuses of fourth amendment rights by individual police departments. Federal courts have used their equitable powers to force police compliance with both the civil rights laws and the fourteenth amendment.[135]

The Supreme Court has cited the possibility of obtaining effective declaratory relief against an identifiable pattern of fourth amendment violations to justify not applying the exclusionary rule. In *Lopez-Mendoza*, it noted that because the INS is a centralized agency "engaged in operations of broad scope but highly repetitive character . . . [t]he possibility of declaratory relief against the agency . . . offers a means for challenging the validity of INS practices." For this and other reasons, the Court con-

134. *See* Schlesinger, *supra* note 98, at 123-32.

135. *See, e.g.*, Lankford v. Gelston, 346 F.2d 197 (4th Cir. 1966) (injunction against Baltimore Police Department upon showing that over 300 homes had been searched for fugitives on the basis of anonymous tips).

cluded that the deterrent value of the exclusionary rule in deportation proceedings was "undermined."[136]

Nonetheless, there remain obstacles to the use of declaratory relief as an effective alternative to the exclusionary rule for fourth amendment violations. Under *Rizzo v. Goode*[137] a party seeking relief must shoulder the heavy burden of demonstrating that systematic violations are the result of a policy of the defendant agency. Moreover, in *City of Los Angeles v. Lyons*,[138] the Supreme Court highlighted the formidable standing problem involved: a party injured in the past cannot obtain an injunction unless he can demonstrate that he is likely to be a victim of the offending practice sometime in the future.[139] Finally, since contempt sanctions are usually imposed only for knowing or willful violations, this remedy comes with a built-in good faith defense for the police.[140]

E. Civil Damage Suits

1. Bivens *Actions*

From the adoption of the fourth amendment in 1791 until the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[141] a person whose fourth amendment rights had been violated by a federal law enforcement officer could not recover compensation in federal court from either the officer or the government. The absence of an act of Congress providing a cause of action was thought to shield the officer from personal liability,[142] and the doctrine of sovereign immunity was an insurmountable barrier to recovery against the United States.[143] Thus, prior to the adoption of the exclusionary rule, the sole remedy for an unlawful search and

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136. 468 U.S. at 1045.

137. 423 U.S. 362 (1976).

138. 461 U.S. 95 (1983).

139. *See* Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases*, 83 COLUM. L. REV. 1365, 1387 (1983).

140. *See* Schroeder, *supra* note 108, at 1407-1410; *see also* KAMISAR, LAFAVE, & ISRAEL, MODERN CRIMINAL PROCEDURE 238-39 (5th ed. 1980).

141. 403 U.S. 388 (1971).

142. *See* Bell v. Hood, 327 U.S. 678 (1946); Bivens v. Six Unknown Named Agents, 409 F.2d 718 (2d Cir. 1969), *rev'd*, 403 U.S. 388 (1971).

143. Until 1974, the waiver of sovereign immunity reflected in the Federal Tort Claims Act did not extend to intentional torts committed by federal law enforcement

seizure by federal officers was an action under state law for trespass or, in some instances, for assault, battery, false arrest, or false imprisonment as well. The exclusionary rule provided another avenue of redress, but only to persons prosecuted on the basis of unlawfully obtained evidence; and, even for those persons, the remedy was limited to suppression of the evidence.

In *Bivens*, however, the Supreme Court held that federal courts could entertain suits for damages brought by victims of illegal searches against the responsible federal officers, notwithstanding the absence of a congressional enactment creating such a cause of action. Such a remedy, the Court reasoned, could be implied from the fourth amendment's guarantee against unreasonable searches and seizures, absent an "explicit congressional declaration that persons injured by a federal officer's violation of the fourth amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress."[144] Subsequently, the Court emphasized that *Bivens* is intended to serve a deterrent as well as a compensatory purpose.[145]

In theory, a *Bivens* action has three advantages over the exclusionary rule as a deterrent and remedial device. First, it offers redress to persons whose fourth amendment rights are violated but who are not prosecuted. Second, it has an element of proportionality, because the amount of a judgment may be varied to reflect the seriousness of the constitutional violation. Third, by threatening the individual officer with personal liability, it produces a measure of "specific deterrence." At a practical level, however, *Bivens* actions are subject to several criticisms from the standpoint of plaintiffs, defendants, and society.

It has been estimated that, since 1971, some 12,000 *Bivens* suits have been filed against individual federal employees. Because the courts have extended the *Bivens* rationale to permit suits based on constitutional violations other than unlawful searches,[146] and because the Department's records of *Bivens* actions are not maintained in a manner that permits ready identification of the particular constitutional violations alleged, it is not known how many of these suits arose out of allegedly unlawful searches and seizures. What is known, however, is that in

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officers in the performance of their duties. *See* 1974 U.S. CODE CONG. & ADMIN. NEWS 2790-91.

144. 403 U.S. at 397.

145. *See* Carlson v. Green, 446 U.S. 14, 21 (1980).

146. *See, e.g.*, Davis v. Passman, 442 U.S. 228 (1979) (fifth amendment violation); Carlson v. Green, 446 U.S. 14 (1980) (eighth amendment violation).

very few of these cases—less than thirty-two by the end of 1985—were verdicts rendered against federal officers, and in fewer still were those judgments sustained on post-trial motion or on appeal. In fact, there have been only five cases in which the individual defendants have had to pay damages.[147]

The lack of success experienced by plaintiffs in constitutional tort suits may result in part from a paucity of valid claims against federal officers. In actions based on the fourth amendment, juries may also tend to sympathize with, and credit the testimony of, the defendant law enforcement officers rather than the plaintiffs, especially if the latter have been charged with or convicted of crimes. The qualified immunity that shields federal officials from suits based on conduct that was objectively reasonable further reduces the likelihood of recovery.[148] There are other factors as well—principally the difficulty of proving damages if no physical injury was inflicted on the plaintiff or if his property was not damaged, and the difficulty of collecting any award because the defendant may be "judgment proof."

Bivens suits also have problematic features from the point of view of law enforcement officers and society. Although the officers can be reasonably confident that they will ultimately be exonerated, during the pendency of the suit their credit is impaired and they are subjected to the emotional pain and humiliation of being publicly charged with violating the very rights it is their duty to protect. Moreover, the ever-present threat of personal financial liability for well-meaning action taken in the ordinary course of their duties may dissuade some officers from enforcing the law as vigorously as society would wish.[149] As the Supreme Court has recently recognized, "there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' "[150] In short, *Bivens* actions have a substantial capacity for deterring desirable as well as undesirable law enforcement behavior.

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147. This data was furnished to the Office of Legal Policy informally by the Torts Branch of the Civil Division on January 7, 1986.

148. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

149. *See* Scheuer v. Rhodes, 416 U.S. 232, 240 (1974) (potential liability will deter police from decisively and willingly executing their duties).

150. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (brackets in original) (quoting from Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)).

2. *Federal Tort Claims Act Suits*

In 1974, Congress amended the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680, to permit suits against the federal government based on certain kinds of tortious conduct—assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution—by investigative or law enforcement officers of the United States. As a result, a person whose fourth amendment rights have been violated by an unlawful search now has the option of seeking damages from the United States.[151]

The principal advantage of this option, of course, is the ability of the government to pay any judgment that may be entered against it. It may also be advantageous for a plaintiff to have his claim heard by a judge rather than a jury.[152] In other respects, however, an FTCA suit is no more attractive—and possibly less so—than a *Bivens* action from the standpoint of potential plaintiffs. Unlike a *Bivens* suit, an FTCA action does not allow an award of punitive damages.[153] Furthermore, in a suit under the FTCA, the United States can avail itself of the same defenses that would be available to its officers if they were sued individually under a *Bivens* theory.[154] Thus, a person seeking to recover damages for an unlawful search must show that the government's agents acted unreasonably, whether or not he sues the responsible individuals. The legislative history of the 1974 amendment indicates that the new cause of action against the United States was intended to supplement rather than supplant the *Bivens* remedy against individual law enforcement officers.[155] This intention has been given effect by the Supreme Court, which has concluded that—in light of the differences in the two actions and in the absence of special factors—a person wronged by an unlawful search may pursue either remedy.[156] However, a judgment against the United States in an FTCA suit bars the

151. *See* 28 U.S.C. § 2680(h); 1974 U.S. CODE CONG. & ADMIN. NEWS 2791.

152. As noted above in the discussion of *Bivens* suits, jurors may be inclined to credit the testimony of law enforcement officers more than that of certain types of plaintiffs. Trial by jury is not permitted, however, under the FTCA. *See* 28 U.S.C. § 2402.

153. *See* 28 U.S.C. § 2674; *cf.* Carlson v. Green, 446 U.S. 14, 22 (1980) (punitive damages permitted in *Bivens* suit).

154. *See* Norton v. Turner, 581 F.2d 390, 393 (4th Cir.), *cert. denied*, 439 U.S. 1003 (1978) (in suit under FTCA, United States is entitled to raise all defenses available to its agents, including good faith and reasonable belief).

155. *See* 1974 U.S. CODE CONG. & ADMIN. NEWS 2791 (1974 FTCA amendments were intended as "a counterpart" to *Bivens* by making the government independently liable).

156. *See* Carlson v. Green, 446 U.S. at 18-23.

plaintiff from proceeding against the responsible government employees.[157]

Despite the availability of the FTCA, very few suits have been brought under the 1974 amendment,[158] as compared with the thousands of *Bivens* actions that have been filed since 1971. Two explanations can be suggested for this imbalance, both of which relate to the psychology of persons who believe or claim that their fourth amendment rights have been violated. First, since an unlawful search may result in only nominal damages, plaintiffs may be more attracted by the prospect of recovering a judgment for punitive damages in a *Bivens* suit, even if the judgment may not be enforceable, than by the lure of recovering actual damages in an FTCA action. Second, in these cases the plaintiff's primary motivation may not be to obtain monetary redress, but to retaliate against the individuals responsible for the alleged wrong. For this purpose, a suit against an impersonal entity is far less satisfactory than an action against individuals who can be made to suffer whether or not they are ultimately found liable and actually respond in damages.[159]

Whatever its causes, the apparent preference for *Bivens* actions on the part of persons allegedly subjected to fourth amendment violations has perpetuated many of the problems existing before Congress amended the FTCA. Federal law enforcement officers are still subject to harassing lawsuits that threaten them with personal liability for their official conduct, and society continues to risk an unacceptable reduction in the willingness of these officers to discharge their duties vigorously and fearlessly.

3. Suits under 18 U.S.C. § 2520

In addition to *Bivens* and FTCA suits, which can be brought by anyone whose fourth amendment rights have been violated, federal law provides a special civil cause of action to persons whose wire or oral communications have been unlawfully intercepted, disclosed, or used. Under 18 U.S.C. § 2520, such persons

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157. *See* 28 U.S.C. § 2676.

158. The Civil Division's Torts Branch reported to the Office of Legal Policy informally on January 7, 1986 that, although no satistics are available, the number of suits based on amended section 2680(h) has been "de minimis."

159. A third explanation could be that there is no imbalance. As noted above, it is not known how many of the *Bivens* suits were based on fourth amendment claims. If this figure could be determined, it might be found to approximate the number of FTCA suits brought against federal law enforcement officers.

may sue the individuals responsible—but not the government—and may recover compensatory damages of not less than the greater of $100 a day for each day of violation or $1,000, as well as punitive damages and the costs of litigation, including reasonable attorneys' fees. The statute specifically provides that good faith reliance on a court order or legislative authorization constitutes a complete defense to such an action.

This specialized statute permits generous recoveries and, hence, provides ample incentive to sue. Nevertheless, the annotations to the statute indicate that very few such actions have been brought. The paucity of such suits is no doubt explained largely by the fact that—due to the care with which federal law enforcement officers engage in electronic surveillance—this type of fourth amendment violation is extremely rare. Additional explanations may be that, when violations do occur, the availability of the statutory defense, or the perceived inability of potential defendants to satisfy a judgment, render a lawsuit futile—although the same considerations do not appear to deter plaintiffs from bringing *Bivens* suits.

4. Actions under 42 U.S.C. § 1983

A counterpart to the damage remedies available to persons whose fourth amendment rights have been violated by federal agents is provided by 42 U.S.C. § 1983. That statute holds out the prospect of civil redress to persons subjected to unlawful searches and seizures by state or local law enforcement officers acting under color of state law. A suit under section 1983 may be brought either against the individual officers involved,[160] or against the municipality or local government that employs them.[161] Moreover, if the suit is successful, the plaintiff is entitled to an award of attorneys' fees.[162]

However, suits based on unlawful searches and seizures appear to be a relatively limited category of section 1983 litigation. The annotations to 42 U.S.C. section 1983 reflect fewer than three dozen reported fourth amendment cases over the past 20 years.

Factors that may discourage such suits have already been noted in the discussion of *Bivens* actions. For example, in a suit

160. *See* Monroe v. Pape, 365 U.S. 167 (1961).
161. Monell v. Department of Social Services, 436 U.S. 658 (1978).
162. *See* 42 U.S.C. § 1988.

against the individual police officers under section 1983—as in a *Bivens* action—the plaintiff must overcome the defense of "good faith" available to the officers.[163] Moreover, even if the plaintiff surmounts this hurdle, the monetary award he receives may be unenforceable because the defendant officers lack the resources to satisfy a judgment for substantial damages.

The prospects of obtaining satisfaction of a judgment are considerably greater in a suit against the municipality whose officers conducted an unlawful search. The chances of prevailing at trial may be better, as well, because the municipal defendant—unlike the federal government in a FTCA suit—cannot rely on the good faith immunity of its individual police officers[164] in defending against a suit.[165] Nevertheless, the plaintiff cannot prevail simply on a respondeat superior theory. Instead, he must show that the unconstitutional action implemented or executed an official policy of the local government.[166] This requirement may inhibit some section 1983 suits based on fourth amendment violations, since most unlawful searches are the result of wrongful actions by individual law enforcement officers, rather than the consequences of official policy decisions to violate the fourth amendment. However, even a policy that is not itself unconstitutional—such as a policy of providing inadequate training—may satisfy the *Monell* requirement if it is shown to be causally related to the constitutional deprivation and the product of a conscious choice by the policymaker.[167] While no doubt difficult to make, such a showing is not impossible.[168]

F. A Limited Or Modified Exclusionary Rule

In addition to the proposals that have been made to abolish the exclusionary rule outright and substitute some different species of remedy or deterrent, there are a number of proposals to modify or curtail the exclusionary rule while retaining it in some instances. Some of these proposals remain theoretical, while

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163. *See* Pierson v. Ray, 386 U.S. 547, 555-57 (1967).

164. *See* Owen v. City of Independence, 445 U.S. 622 (1980).

165. Since the good faith of the officers is not in issue, an inclination of jurors to resolve testimonial conflicts in favor of the officers may not be as important a factor in suits against municipalities as it might be in suits against individual officers.

166. *See* Monell v. Department of Social Services, 436 U.S. 658, 690 (1978).

167. *See* Oklahoma City v. Tuttle, 471 U.S. 808 (1985).

168. *Cf.* Grandstaff v. City of Borger, 767 F.2d 161 (5th Cir. 1985).

others have been incorporated in proposed legislation or model codes.[169]

1. *Expanding the "Good Faith" Exception to Warrantless Searches and Seizures*

In *Leon,* the Supreme Court created an exception to the exclusionary rule for cases in which an officer acts in objectively reasonable reliance on a warrant obtained from a magistrate. This so-called "good faith" exception was grounded in the majority's conclusion that the rule generally has minimal or no legimate deterrent effect in cases where officers attempt to comply with fourth amendment requirements by obtaining a warrant, but the warrant subsequently proves defective.[170]

The Administration has supported a "good faith" exception for both warrant and warrantless searches.[171] Legislation including a generalized "good faith" exception has been introduced at the federal level and passed by the Senate.[172]

Application of the "good faith" exception to warrantless searches and seizures is a natural and reasonable extension of the principle embodied in *Leon.* If the exclusionary rule has no legitimate deterrent effect in relation to an officer acting in "good faith" with a warrant, it would seem that the same is true in relation to an officer acting in "good faith" in a non-warrant case. Certainly, some of the language justifying the "good faith" exception in *Leon* appears applicable to both types of searches.[173] On the other hand, *Leon*'s holding did not extend to searches in warrantless cases. First, the Court observed approvingly that the probable cause determination in a warrant case would be in the hands of a "neutral and detached magistrate," not in the hands of the police. Second, the presence of a warrant

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169. *See generally* S. Rep. No. 350, 98th Cong., 2d Sess. 1-3 (1984)

170. *See supra* notes 59-65 and accompanying text.

171. President Reagan has personally endorsed legislation to expand the good faith exception. *See* 128 Cong. Rec. S11228 (daily ed. Sept. 13, 1982); *see also* ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT 55 (1981) ("[E]vidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the reasonable good-faith belief that it was in conformity to the fourth amendment.").

172. The general "good faith" legislation was passed by the Senate in 1984 as S. 1764. *See generally* S. Rep. No. 350, 98th Cong., 2d Sess. (1984).

173. *E.g.,* "[E]ven assuming that the rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." United States v. Leon, 468 U.S. 897, 918-19 (1984).

also provides a relatively easy means for a reviewing court to examine the "good faith" question, because a " 'warrant issued by a magistrate normally suffices to establish' that a law enforcement officer has 'acted in good faith in conducting the search.' "[174]

The extension of the exception, accordingly, would require the courts to embark on the more difficult task of ascertaining whether a warrantless search was conducted in "good faith." The extension of the exception has been attacked on this and other grounds by commentators, several of whom believe that such an extension would undercut the incentives *Leon* established for getting a warrant whenever possible.[175] Nonetheless, even under *Leon* courts must examine the question whether an officer's reliance on a warrant is "objectively reasonable." It would, therefore, appear to be a difference of degree rather than kind for a court to determine whether an officer acted in objective good faith in conducting a warrantless search. The courts must in any event develop criteria for such review in applying the "good faith" defense in *Bivens* suits and section 1983 suits based on warrantless searches.[176]

2. *Limiting the Exclusionary Rule to Exempt Certain Serious Crimes*

The Chief Justice, among others, has criticized the exclusionary rule as a "monolithic" response to fourth amendment violations of varying degrees. Indeed, much of the opposition to the rule is attributable to the relatively small number of cases where a murderer, rapist, or arsonist is set free because of the operation of the rule, rather than those where a pickpocket or petty drug user is turned loose.

Accordingly, to the extent the exclusionary rule does serve some worthwhile purpose, the bulk of its deterrent value might be preserved by keeping the rule for most crimes, but not suppressing evidence needed to convict for the most serious offenses. At least one commentator has suggested that "the rule not apply in the most serious cases—treason, espionage, murder,

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174. *Leon*, 468 U.S. at 922 (quoting United States v. Ross, 456 U.S. 798, 823 n.32 (1982)).

175. *See, e.g.*, LaFave, *"The Seductive Call of Expediency": United States v. Leon, Its Rationale and Ramifications*, 4 U. ILL. L. REV. 896, 926-29 (1984).

176. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815-19 (1982) (general application of objective good faith standard in constitutional tort suits).

armed robbery, and kidnapping by organized groups."[177] It is further suggested that judges, freed of social and political pressure to avoid releasing the most serious criminals, would then "be able to interpret more fully and honestly the command of the fourth amendment in all the remaining cases."[178]

One objection to this approach is that—because the fourth amendment does not distinguish between more and less serious crimes—any such graded approach to applying the rules cannot be justified on constitutional grounds.

3. *Limiting the Exclusionary Rule on the Basis of the Degree of Police Misconduct*

A variation of the good faith idea is the notion that not all fourth amendment violations are the same, or of the same seriousness, and that the exclusionary rule should therefore not apply to all violations. Under this approach, the sanction of evidence suppression would be reserved for only the worst search and seizure violations.[179]

One advantage of this approach is that police searches and seizures could be evaluated in terms of how far they departed from the standards of probable cause. Any clear evidence of bad faith on the part of the police could become a "plus factor" contributing to a decision to suppress the evidence.

Another advantage is that this approach would preserve some aspect of the exclusionary rule's supposed deterrence and would focus more attention on the most serious violations. It might work best if it were combined with alternative sanctions in cases where fourth amendment violations occurred but suppression was not justified.

The disadvantages of this solution would include the difficulty of drawing a line at which suppression could be justified. It would, moreover, leave the exclusionary rule subject to most of the same criticisms in those types of cases for which it would be reserved as are made against the rule in its current form.

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177. Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974).

178. *Id.*

179. The American Law Institute MODEL CODE OF PREARRAIGNMENT PROCEDURE § 290.2 (1975) lists a number of factors a court might consider in deciding whether a fourth amendment violation warrants suppression of the illegally seized evidence. The factors include the extent of deviation from lawful conduct, the extent to which a person's privacy has been violated, the willfulness of the violation, and the probability that exclusion will prevent future violations. For a more complete discussion, see Schroeder, *supra* note 108, at 1422-24.

IV. A SUGGESTED APPROACH TO FOURTH AMENDMENT VIOLATIONS

As the discussion in Parts II and III demonstrates, the manner in which current law responds to the evidentiary, deterrent, and remedial issues posed by unlawful searches and seizures is irrational, costly, and ineffective. A more sensible approach is needed. Ideally, such an approach would seek to achieve three objectives: (1) relieving the criminal justice system of the many burdens imposed by the exclusionary rule, while (2) still deterring fourth amendment violations at an acceptable cost, and (3) providing some means of compensation for persons injured by unlawful searches. This section discusses these goals, some of the steps that might be taken to achieve them, and the prospects for success.

A. Abolishing The Exclusionary Rule

The first objective of reform—removing the many burdens imposed by the exclusionary rule—can be achieved only by abolishing the rule.

1. The Case for Abolishing the Exclusionary Rule

To put it succinctly, the exclusionary rule imposes excessive costs on the criminal justice system and on society in return for benefits that—whatever their value—probably could be obtained at a more reasonable price by other methods.

The exclusionary rule exists today principally, if not solely, to deter unlawful searches and seizures, yet there is no persuasive empirical evidence that it does, in fact, perform this function. Certainly, there is a serious question whether investigative conduct, which often occurs under exigent circumstances, can be affected significantly by the prospect of a court's future suppression of evidence. Be that as it may, it is plain that there is no sound reason to suppress evidence obtained by a law enforcement officer acting in a reasonable good faith belief that his conduct is lawful. As the Supreme Court stated in *Leon*: "[E]ven assuming that the rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it

cannot be expected, and should not be applied to deter objectively reasonable law enforcement activity."[180] And, whatever value the exclusionary rule may have as a deterrent to intentional or reckless violations of the fourth amendment committed solely for the purpose of obtaining evidence to support a criminal conviction,[181] any such benefit is far outweighed by the rule's undesirable consequences.

The immediate effect of the rule is to render useless in the prosecution's case-in-chief reliable, probative evidence of guilt that has been secured by means of an unlawful search, unless the search was conducted in objectively reasonable reliance on a subsequently invalidated warrant. As a result, prosecutions are declined when they would otherwise have been undertaken, the charges filed against some defendants do not adequately reflect the seriousness of their crimes, pleas are accepted to less serious charges than would otherwise be warranted, and the suppression of evidence may leave prosecutors with insufficient evidence to obtain convictions. In short—because of the exclusionary rule—some defendants either go scot-free or are not fully prosecuted, despite clear and reliable evidence of guilt. Thus, the rule imposes a penalty upon the criminal justice system—and, ultimately, on society—that is in many cases wholly out of proportion to the gravity of the constitutional violation.[182]

The collateral consequences of a rule requiring the exclusion of such evidence are equally disturbing. Vast amounts of time and energy are expended by prosecutors, defense attorneys, and judges on peripheral questions—relating to the way in which investigations were carried out—rather than on what should be the central question—whether, on the basis of all probative and reliable evidence available, the accused is guilty or not guilty. Moreover, efforts by law enforcement officers and judges to avoid the application of the rule may impair the integrity of the criminal justice process and may even jeopardize fourth amendment rights. In the interest of preserving the admissibility of crucial evidence, some law enforcement officers may yield to the

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180. *Leon*, 468 U.S. at 918-19.

181. Even in this context, the rule may be of little value. *See, e.g.*, Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 418 (1971) (Burger, C.J., dissenting) ("Suppressing unchallenged truth has set guilty criminals free but demonstrably has neither deterred deliberate violations of the Fourth Amendment nor decreased those errors in judgment that will inevitably occur given the pressure inherent in police work having to do with serious crimes.").

182. *Cf. Bivens*, 403 U.S. at 418-19 (Burger, C.J., dissenting) (referring to "the universal 'capital punishment' we inflict on all evidence when police error is shown in its acquisition").

temptation to testify falsely concerning the circumstances attending its acquisition, and some judges may be reluctant to reject such testimony, or may take an unduly narrow view of fourth amendment requirements. In any event, the rule subjects the law and the judicial process to disrespect, if not ridicule, by asking the public to accept the fundamentally illogical proposition that one wrong—a fourth amendment violation—deserves another—exclusion of highly probative and reliable evidence of guilt from criminal trials.[183]

Abolition of the exclusionary rule would permit the use in criminal prosecutions of relevant evidence—assuming it was otherwise admissible—obtained through search and seizure, without the necessity of conducting a simultaneous judicial inquiry into the circumstances under which the evidence was acquired.[184] By obviating suppression hearings, this approach would also eliminate or substantially reduce other disadvantages of the exclusionary rule—particularly the time required to hear and rule on fourth amendment challenges to the government's proof.[185]

Abolition of the exclusionary rule would not, of course, eliminate the need for judicial scrutiny of alleged fourth amendment violations—such scrutiny would continue, but in a civil forum.[186] The question arises, therefore, whether there would be any real saving of time and effort. It seems likely that there would be. Many suppression motions are filed today, not because there has been a fourth amendment violation, but simply because challenging the admissibility of proof of guilt is the only possible "defense." When this incentive is removed, the number of fourth amendment claims that are litigated is likely to drop substantially.

Another factor that might reduce litigation is the difficulty and cost of obtaining legal representation. Since claims will have to be made in the context of civil proceedings, claimants will not necessarily have the assistance of appointed counsel—as many criminal defendants who file suppression motions now do. Some

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183. To the ordinary citizen, it is incomprehensible that "[t]he criminal is to go free because the constable has blundered." People v. DeFore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

184. Even in the absence of the exclusionary rule, the Department might decide as a matter of policy to continue voluntary exclusion of evidence obtained by means of intentional fourth amendment violations.

185. The misallocation of scarce criminal justice resources that is caused by the suppression doctrine is a subject that does not appear to have received adequate attention. An empirical study of this matter by the Department of Justice could be helpful in supporting an argument for complete abolition of the exlcusionary rule.

186. *See generally infra* Part IV.C.

of those who cannot obtain free counsel will no doubt proceed pro se, but others—particularly if their claims are frivolous or marginal—may be discouraged by the prospect of having to pay an attorney out of their own pocket.[187]

Any approach less sweeping than complete abolition of the rule would not be wholly satisfactory. For example, extension of the "reasonable good faith" exception to cases involving warrantless searches would reduce the number of prosecutions in which evidence is excluded, thereby increasing the number of convictions and enhancing public respect for the law, but probably would not reduce significantly the number of suppression hearings or related costs of the exclusionary rule.[188] The same can be said of the approach under which the rule would be applied only in cases involving particularly serious fourth amendment violations, since that is but a variant of the "reasonable good faith" exception. Finally, the approach of suspending application of the rule in prosecutions for especially grave offenses would be very difficult to apply on an even-handed basis, and would most likely reflect *ad hoc* judgments in particular cases.

2. *The Prospects for Abolition*

Because the Supreme Court created the exclusionary rule, the Court can abolish the rule. It could also be abrogated by Congress. There can be no sound constitutional objection to such action by either body, since the rule is not required by the Constitution, but is merely a judicially-created device for deterring unlawful searches and seizures.[189]

Undoubtedly, the likelihood that either body would abandon the exclusionary rule entirely would be enhanced by pointing to the existence of an equally effective alternative. The essential components of such an alternative are an effective disciplinary mechanism to deter fourth amendment violations and an ade-

187. As noted below, if a new civil action were created to compensate victims of unlawful searches, it might limit recovery by convicted defendants to no more than out-of-pocket losses. *See infra* Part IV.C.1.a-.b. This would provide an additional disincentive to litigation of questionable claims.

188. As the Supreme Court recognized in *Leon*: "Although the exception might discourage presentation of insubstantial suppression motions, the magnitude of the benefit conferred on defendants by a successful motion makes it unlikely that litigation of colorable claims will be substantially diminished." United States v. Leon, 468 U.S. 897, 924 n.25 (1984).

189. *See, e.g.*, United States v. Calandra, 414 U.S. 338 (1974); S. Rep. No. 350, 98th Cong., 2d Sess. 5-7 (1984).

quate remedy for the victims of unlawful searches. It is argued below that, although both could be improved, the necessary disciplinary provisions already exist in the federal system and federal civil remedies provide adequate redress and deterrence in their present form.[190]

Assuming, therefore, that an equally effective alternative to the exclusionary rule now exists (or could readily be created) in the federal system, the question is whether Congress or the Supreme Court can be persuaded to abandon the rule. There appears to be a strong likelihood that the Senate would act favorably if pressed to do so (though there is a possibility that harmful amendments could be attached in committee), but there would remain the formidable task of getting an abolition bill to a vote on the floor of the House.[191] It might be easier, under certain conditions, to persuade the Supreme Court to take the final step. The Court would have sufficient justification to do so if the Executive Branch were to demonstrate an impressive record of the use of administrative action to prevent and punish fourth amendment violations, and if it could be shown that federal civil remedies created since *Mapp* provide adequate redress, as well as additional deterrence and a fair opportunity for judicial scrutiny of questionable searches and seizures. Moreover, even if the rule were further diluted by expansion of *Leon* to cover warrantless searches, abolition would be justified if experience demonstrated continued significant burdens on the courts and the related costs resulting from the need to conduct and review suppression hearings.

B. Deterring Fourth Amendment Violations

The second objective of a more sensible approach to fourth amendment violations—deterrence of unlawful searches and

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190. *See infra* Part IV.C.2.

191. Moreover, if the Supreme Court extends the *Leon* good faith exception to warrantless searches, the existing momentum for reform might be weakened considerably, since the rule's principal undesirable consequences—the freeing or unduly lenient treatment of obviously guilty defendants—would probably be reduced greatly. In that event, arguments for complete abolition would have to be made primarily on the basis of the other disadvantages of the exclusionary rule, including the adverse effects on the courts of the continuing requirement of conducting and reviewing suppression hearings and the diminution of the truth-seeking role. Finally, although these arguments would be applicable to all cases, they would have to be made with respect to cases in which law enforcement officers were not acting in an objectively reasonable belief that their conduct was lawful.

seizures—can be achieved by establishing a credible threat to impose appropriate sanctions on federal law enforcement officers who commit fourth amendment violations. As discussed above, the principal methods that might be used to impose sanctions on individual officers are disciplinary proceedings conducted by the employing agency, civil actions for damages, and criminal prosecutions.[192]

While it might be appropriate to resort to criminal proceedings in a particularly egregious case, such cases are extremely rare, and less drastic and more easily imposed sanctions would be preferable in the vast majority of cases. Civil damage actions against the responsible officers meet these requirements but, as noted above, they may also inhibit the officers from engaging in lawful and desirable investigatory activity. Disciplinary proceedings, on the other hand, can provide a direct and discriminating method for imposing merited sanctions. Whether the threat of disciplinary action would be regarded by law enforcement officers, Congress, and the Supreme Court as an acceptable and adequate deterrent to fourth amendment violations would depend on such factors as the nature of the process used to determine the existence of such violations, the impartiality of the fact finder, and the degree to which violations result in the imposition of sanctions that are generally viewed as adequate under the circumstances.

As discussed above, there already exists in the federal system a variety of administrative requirements, policies, and practices, including disciplinary provisions, designed to eliminate unlawful searches and seizures. The possibility of improving these mechanisms should not be overlooked, but it is equally important that their existence and operation be more widely publicized. A keener public appreciation of the comprehensive administrative scheme that the federal government uses to prevent and punish fourth amendment violations would certainly be helpful in establishing the proposition that this approach to deterrence is no less effective—and much less costly—than the exclusionary rule.

Various steps might be considered to enhance the effectiveness and credibility of existing administrative practices. For example, the President or the Attorney General could announce that, henceforth, a review board (perhaps located within the Department of Justice) will investigate all questionable searches and seizures conducted by federal law enforcement officers, and impose appropriate disciplinary measures when warranted. Each

192. *See supra* PART III.B., PART III.C., & PART III.E.

United States Attorney and federal investigative agency could be directed to report such searches to the Department, and the courts could be invited to do so as well. Investigations could be triggered by such a report, by the filing of a citizen complaint or a civil action for damages, or—so long as the exclusionary rule remains in force—by a motion to suppress. The range of available disciplinary actions could be publicized, and it could be announced that, as a matter of policy, some measure of discipline would be imposed in every case in which the officer's action was determined not to have been objectively reasonable.

C. Redressing Injuries Caused By Fourth Amendment Violations

The third objective of a sensible approach to unlawful searches and seizures is the provision of adequate compensation to persons injured by fourth amendment violations. It is frequently argued that existing remedies are inadequate,[193] and that attainment of this objective requires the creation of a new federal cause of action against the United States. We initially discuss in this part how such a new action might be designed.

However, as discussed below, an effort to establish a new civil remedy would be fraught with difficulties and could yield unacceptable results in terms of the scope of the government's liability. On the other hand, the Department can argue that, although existing federal remedies could be improved upon, they already provide sufficient opportunities for redress in deserving cases, as well as enough incremental deterrence, to be regarded—together with the administrative practices discussed above—as an adequate substitute for the exclusionary rule as it is likely to evolve in the federal system.[194] This argument is developed in the latter portion of this part.

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193. The limitations of existing civil remedies are discussed *supra* in Part III.E.

194. As the discussion below indicates, however, there is concern that existing causes of action would not bring allegedly unlawful searches to the courts in sufficient numbers to persuade the Supreme Court that such actions are a viable alternative to the exclusionary rule. This concern might be addressed by altering existing causes of action somewhat to encourage their more frequent use in meritorious cases.

1. A New Cause of Action

The primary purpose of creating a new cause of action would be remedial, but any new remedy should, if possible, achieve other important goals as well: eliminating the exposure of individual agents to the risk of personal liability and providing deterrence through the enhanced likelihood of disciplinary action in appropriate cases.

The latter objectives may be more easily attained than the former. Federal agents can be shielded from individual liability by providing an exclusive cause of action against the United States for all unlawful searches and seizures (including illegal electronic surveillance), by expressly precluding suits against individual federal law enforcement officers based on a *Bivens* theory, and by repealing 18 U.S.C. § 2520. Added deterrence can be achieved by requiring the employing agency to satisfy an award of damages out of its own funds in cases involving fault on the part of its employees. This requirement would create an additional incentive for agencies to train, supervise, and discipline their employees in such a manner as to prevent the occurrence of avoidable fourth amendment violations.

More difficult issues to resolve in creating a new civil remedy relate to the scope of recovery, the types of plaintiffs who may recover, the availability to the government of its employees' defense of qualified immunity, and the mechanisms to be employed for determining the validity of challenged searches, as well as for assessing damages and the need for disciplinary action. Although a detailed examination of these issues is beyond the scope of this Report, some discussion of the considerations involved is warranted.

a. Scope of recovery— The principal questions concerning the scope of recovery for fourth amendment violations are whether liquidated damages should be awarded in cases in which it is difficult or impossible to prove actual damages, whether punitive damages should be permitted, and whether awards of attorneys' fees should be allowed. Liquidated damages may now be awarded against individual law enforcement officers found liable in actions under 18 U.S.C. § 2520, and there appears to be no sound reason for not including a similar provision in suits against the government.[195] Moreover, the prospect of at

195. The Administration's proposed Federal Tort Claims Act amendments—initially included in Title XIII of the proposed Comprehensive Crime Control Act of 1983 but ultimately not adopted—would have provided successful plaintiffs with liquidated dam-

least some recovery would provide an incentive to bring questionable searches and seizures to the attention of the appropriate authorities. The greater that incentive, the less the justification for relying on the exclusionary rule and suppression motions to serve the same purpose.

The same rationale could be used to justify attorneys' fees awards to successful plaintiffs.[196] An additional justification is the fact that fees are recoverable in suits against individuals under 18 U.S.C. § 2520.[197] On the other hand, permitting recovery of attorneys' fees in addition to actual or liquidated damages would be more costly for the government, might tend to invite artful pleading aimed at converting ordinary tort claims into constitutional tort cases, and could encourage the filing of frivolous or malicious actions. On balance, we do not recommend any expansion of fee shifting statutes.

Awards of punitive damages would also enhance the incentives to sue for fourth amendment violations, but probably at a cost that is excessive relative to the benefit. Although punitive damages may be awarded against individuals in *Bivens* suits, they are not permitted in FTCA actions primarily because their burden falls ultimately on innocent members of society rather than on the individuals responsible for the government's wrongdoing. For these reasons, and because agencies would have sufficient incentive to discipline errant employees under such a system, recovery of punitive damages should not be permitted.

b. Standing to sue— A difficult policy question that would have to be resolved in creating a new civil damage remedy is whether to authorize payment of damages to guilty defendants. Such persons may now recover damages under either *Bivens* or the FTCA. Bearing in mind that an important purpose of a new remedy would be to provide a substitute to suppression hearings as a means of raising claims of fourth amendment violations, it would seem desirable to provide guilty defendants with some material incentive to sue. On the other hand, it may be thought inappropriate for the government to pay a person whose criminal activity created the need to conduct a search and seizure in the first place. If this is a serious concern, one possible resolution would be to permit suits by convicted defendants, but to

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ages of $1,000 in any case and up to $15,000 in cases involving continuing constitutional torts.

196. *But see infra* note 210.

197. In actions against the government under the FTCA, fees are paid out of the judgment for damages rather than being added to that award, and may not exceed 25% of the judgment. *See* 28 U.S.C. § 2678.

restrict their recovery to out-of-pocket expenses that would not have been incurred had the government's conduct been lawful. The difficulty with such a limitation, of course, would be that—since few searches result in actual physical damage—it would severely reduce the incentive of guilty persons to challenge questionable searches.

c. Availability of the good faith defense— Perhaps the most difficult policy question to be resolved in attempting to structure a new civil remedy against the United States for fourth amendment violations is whether the government should be allowed to assert as a defense the qualified immunity that would be available to its employees if they were sued individually under a *Bivens* theory or under 18 U.S.C. § 2520. As noted above, the United States can now defend FTCA suits arising out of unlawful law enforcement behavior by proving that the conduct in question was objectively reasonable.

We have previously argued forcefully in favor of retaining this defense in the context of an improved remedy for fourth amendment violations.[198] Thus, we have claimed that imposing strict liability on the United States, which would be the result of waiving the defense, in an area of the law that is frequently vague and constantly shifting would be unfair and unwise because it would result in liability for conduct that seemed entirely reasonable at the time it occurred. We have also argued that imposing strict liability would impair employee morale and inhibit reasonable law enforcement behavior by treating reasonable conduct in the same way as unreasonable behavior, and that it would preclude thorough examination by the courts of all factors relevant to the validity of allegations of official misconduct.[199]

The arguments in favor of imposing absolute liability on the government for fourth amendment violations also rely on considerations of fairness. Thus, some have claimed that compensation should be provided whenever the government violates a constitutional right because the government is the party whose agents acted unlawfully and because—even though its agents

198. *See Hearings before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary on the Comprehensive Crime Control Act of 1983 (S. 829)*, 98th Cong., 1st Sess. 87-91 (1984) (responses to Senator Biden's questions regarding torts claim amendments).

199. These latter arguments assume that because the reasonableness of the agent's conduct would not be relevant to the question whether the government is liable for damages, the agent's culpability would be totally irrelevant. That assumption would be incorrect if the new civil action required a determination by the court of the need to refer the case to the employing agency when the fourth amendment violation appeared to involve fault on the part of the agent.

were not at fault—the government is better able than the persons injured to absorb the loss.

Whatever the merit of these competing arguments, recent history suggests that the debate over whether to include the defense of qualified immunity in a new fourth amendment action against the United States would be decided on the basis of broader considerations. Several years ago, in Title XIII of the proposed Comprehensive Crime Control Act of 1983, the Administration proposed amendments to the FTCA that would have created a civil remedy along the lines discussed here.[200] A key feature of the Administration bill was that all defenses available to the employee would continue to be available to the government. During the course of consideration of the bill in the House and Senate Judiciary Committees, it became apparent to the Department that the House Committee would not accept this limitation on the proposed remedy and that the Senate Committee would accept it only in part. As a result, fearing the passage of a bill that would expose the United States to an unacceptable level of liability, the Department decided to withdraw its support, and the bill died in the 98th Congress. Thus, any effort to enact legislation addressing fourth amendment violations would have to take into account this history of opposition.

d. Mechanism for identifying fourth amendment violations and imposing sanctions— The combination of the deterrence that would be provided through disciplinary proceedings and the remedial provisions of a new civil action would be intended to obviate the exclusionary rule. These measures would provide an alternative method for subjecting a fair proportion of questionable searches and seizures to official scrutiny to decide whether fourth amendment violations have taken place and, if so, what the consequences should be. The remedial and disciplinary tasks would be performed in separate proceedings: one conducted by a court for the purpose of determining whether, and to what extent, the government is liable for damages, and the other conducted by a Departmental review board or other administrative entity to assess the need to impose disciplinary sanctions on the responsible officers. For the reasons noted above, however, the formulation of a new civil remedy presents a number of difficult

200. That proposal was motivated not by exclusionary rule considerations, but rather by a desire to make the government the sole defendant in suits based on constitutional torts committed by federal employees. However, the bill did include a provision that—in cases in which damages were awarded against the United States—would have created the possibility of disciplinary action against employees whose constitutional torts were not committed in good faith.

policy questions whose resolution would predictably be controversial.

The difficulty of resolving the issues involved in creating a new civil remedy to the satisfaction of the Department is not the end of the matter. Even if an acceptable bill could be devised and brought to a successful vote on the Senate floor, there would remain the formidable hurdle of the House Judiciary Committee. Since that body has shown no inclination toward diminution of the scope of the exclusionary rule—to say nothing of abolition—it might resist efforts to establish an alternative remedy that might ultimately lead to complete abrogation of the rule. Moreover, although the Committee is likely to favor legislation that provides an improved civil action for fourth amendment violations, it probably would add provisions—such as waiver of the good faith defense—that would be unacceptable to the Administration. The Committee might also include a proviso that the new remedy is not intended to furnish a basis for displacing the exclusionary rule as the sole deterrent to unlawful searches. In either event, enactment of legislation satisfactory to the Administration would depend on the Administration's ability to persuade the full House or a conference committee to delete the undesirable provisions.

2. *Reliance on Existing Remedies*

Given the difficulties of devising and obtaining passage of acceptable legislation to create a new civil remedy for fourth amendment violations, it would be preferable to argue to the Supreme Court that existing federal remedies—when coupled with sound administrative practices—provide an adequate alternative to the exclusionary rule. Two considerations suggest that this could be a fruitful approach: the enhancement of federal civil remedies since *Mapp*, and the likely extension of the *Leon* good faith exception to cases involving warrantless searches.

In *Mapp*, the Supreme Court buttressed its decision to apply the exclusionary rule to the states by reference to "[t]he obvious futility of relegating the Fourth Amendment to the protection of other remedies."[201] However, the remedial landscape has changed considerably since *Mapp*. Within the federal jurisdiction, it now includes such prominent features as *Bivens* suits, FTCA actions, and suits under 18 U.S.C. § 2520, to say nothing

201. Mapp v. Ohio, 367 U.S. 643, 652 (1961).

of administrative requirements and sanctions. In addition, the Supreme Court's decisions since the landmark 1961 decision in *Monroe v. Pape*[202] have revolutionized the law with respect to the liability of state and local law enforcement officers for fourth amendment violations.[203]

The Court has never been asked to consider the adequacy of these remedies—either singly or in combination—as surrogates for the exclusionary rule. Its closest approach to this question was in *INS v. Lopez-Mendoza*,[204] and there it appeared to endorse the adequacy of alternatives to the exclusionary rule.[205] What is particularly significant about *Lopez-Mendoza* in this regard is that the alternatives cited by the Court—the administrative requirements and practices of the INS and the possibility of suits for declaratory relief against the agency—did not even include civil actions for damages. The Court's willingness to accept these substitutes in the narrow context of deportation cases certainly suggests that, in the broader context of federal criminal cases generally, it might be equally receptive to an approach that offers, in addition to those alternatives, an even greater deterrent and remedial potential in the form of *Bivens*, FTCA, and 18 U.S.C. § 2520 actions.

The second factor that bodes well for an argument that existing federal civil actions provide an adequate remedial alternative to the exclusionary rule is the recent restriction of the rule in *Leon*. In *Leon*, en route to its conclusion that the exclusionary rule should not be invoked to bar admission of evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant, the Court explicitly endorsed the proposition that the exclusionary rule cannot be expected to deter objectively reasonable investigative activity by law enforcement officers.[206] Although the decision not to apply the exclusionary rule under such circumstances was made in the context of a search conducted pursuant to a warrant, the Court's logic seems to compel the same result in cases involving warrantless searches. If the Court does extend the *Leon* exception to war-

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202. 365 U.S. 167 (1961).

203. *See generally supra* Part III.E.4.

204. 468 U.S. 1032 (1984).

205. In partial justification for its conclusion that the exclusionary rule should not be applied in civil deportation proceedings, the Court cited the fact that "the INS has its own comprehensive scheme for deterring Fourth Amendment violations by its officers," and added that "the deterrent value of the exclusionary rule in deportation proceedings is undermined by the availability of alternative remedies for institutional practices by the INS that might violate Fourth Amendment rights." *Id.* at 1044-45.

206. *See* United States v. Leon, 468 U.S. 897, 918-19 (1984).

rantless searches, the rule will apply only to fourth amendment violations resulting from law enforcement conduct that is not objectively reasonable. In other words, the rule will be applied only for the purpose of deterring objectively unreasonable law enforcement activity.

Such a development could have a great bearing on perceptions of the adequacy of current federal civil remedies for fourth amendment violations. One of the principal drawbacks of these existing causes of action from the point of view of potential plaintiffs is that they provide no remedy in cases in which the law enforcement officers acted in good faith. Once it is firmly established that the exclusionary rule exists only to deter what amount to bad faith violations of the fourth amendment, this will no longer be a valid criticism of the adequacy of these civil actions as an alternative to the rule. In that event, the kinds of violations that will trigger application of the exclusionary rule—bad faith violations—will be the same types of violations for which such suits permit the recovery of damages. Moreover, given the identical focus of the two types of responses to fourth amendment violations, it will be easier to compare their strengths and weaknesses in other respects bearing upon the question whether one is an adequate substitute for the other.

As regards this question, it seems clear that civil suits constitute a more rational and a more equitable response to unlawful searches and seizures than does the exclusionary rule—particularly when they are used as a complement to effective prophylactic and punitive administrative measures. Without affecting the integrity of criminal prosecutions or otherwise demeaning the criminal justice process, civil suits—particularly FTCA actions—can provide innocent as well as guilty victims of fourth amendment violations with an opportunity to secure an award of actual damages in a neutral forum and against a financially responsible defendant. Moreover, if plaintiffs are dissatisfied with that remedy and think they can collect a judgment for punitive damages from the responsible officers, they have the option of suing those individuals under *Bivens* additionally, or alternatively.[207]

Nevertheless, despite the obvious superiority of civil suits in these respects, there is one aspect of the exclusionary rule that they may not be able to duplicate. This is the suppression doc-

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207. *See* Carlson v. Green, 446 U.S. 14 (1980). However, a judgment for the plaintiff under the FTCA would preclude a *Bivens* award against the individual officers. *See* 28 U.S.C. § 2676.

trine's function as a vehicle for bringing before the courts novel questions of fourth amendment law and, thereby, providing opportunities for judicial guidance concerning the lawfulness of innovative search and seizure practices. Whether existing civil remedies can reasonably be counted on to perform this service will depend on two factors: the number of cases in which it is arguable that a fourth amendment violation occurred as a result of objectively unreasonable law enforcement conduct and the strength of the incentives (or disincentives) for victims to sue for damages in such cases.

To elaborate, because plaintiffs will have to overcome the good faith defense, the only FTCA or *Bivens* suits that they are seriously likely to consider bringing are those in which it is arguable that an unlawful search or seizure occurred and that the officers' conduct was not objectively reasonable, and in which actual damages were sustained. However, because of the costs and risks of litigation, not all cases meeting these requirements will be pursued. Thus, the number of fourth amendment claims presented to the courts certainly will be smaller than the number raised by means of suppression motions today.[208] The largest category of situations in which civil damages will not be sought will be those involving insubstantial fourth amendment claims or clearly reasonable law enforcement conduct. Elimination of litigation in these situations will certainly be a wholly desirable result. However, some plaintiffs will forego suit not because their claims lack merit, but because of insufficient incentive to bring those claims to the attention of the courts. In the case of ordinary civil litigation, such a result might be inequitable to the injured party, but not intolerable to society. Here, however, because constitutional protections are involved, the interest of society as well as of the individual may be jeopardized by a substantial reduction in the incentives for litigating arguable fourth amendment issues.

The possibility that the substitution of existing civil remedies for suppression motions would lead to a significant diminution in opportunities for the courts to review genuine fourth amendment questions might well give the Supreme Court pause.[209]

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208. *See supra* notes 186-87 and accompanying text. Under the current system, as the Supreme Court pointed out in *Leon*, "the magnitude of the benefit conferred on defendants by a successful [suppression] motion" creates a tremendous incentive to litigate fourth amendment claims. 468 U.S. at 924 n.25.

209. In *Leon*, the Court was confronted with arguments that adoption of a good faith exception to the exclusionary rule in warrant cases would preclude review of the constitutionality of searches and seizures, deny needed guidance from the courts, or freeze

Two steps could be taken to alleviate the Court's concern in this regard. The first would be for the Department to demonstrate—by means of an empirical study of all instances of allegedly unlawful searches or seizures that come to its attention—that every arguable fourth amendment violation results in an administrative investigation, that appropriate disciplinary action is taken when warranted, and that civil suits for damages are filed in a fair proportion of cases in which it appears that serious and unjustified violations may have occurred. Such a showing would support the conclusion that a reduced level of judicial oversight is not likely to result in a significant dilution of fourth amendment protections.

The second initiative that could be taken to dispel doubts concerning the utility of civil suits as vehicles for judicial review of search and seizure practices is to amend the FTCA to permit awards of liquidated damages.[210] Enhancing the attractiveness of FTCA actions in this manner would give greater assurance that legitimate fourth amendment claims will be presented to the courts rather than abandoned because their pursuit would not be economical. To be sure, allowance of liquidated damages would impose an additional burden on the federal treasury. However, if the government's administrative practices work effectively to prevent bad faith violations of the fourth amendment, the number of cases in which the United States will be found liable will not be great, nor will this burden be heavy. Whatever the weight of the burden, morever, the ultimate question for the government is whether it would be more than offset by relief from the burdens imposed by the exclusionary rule. Given the very substantial social costs of the rule, this cost of its abolition does not seem excessive.

CONCLUSION AND RECOMMENDATIONS

The development and application of the exclusionary rule in the United States are at odds with and undermine a number of

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fourth amendment law in its present state. The Court rejected these arguments, pointing out the discretion of reviewing courts to decide suppression motions on the basis of the fourth amendment issues involved if that course appears desirable. 468 U.S. at 925. Of course, abolition of suppression motions would remove this opportunity.

210. As noted above, the FTCA amendments proposed in the Comprehensive Crime Control Act of 1983 would have allowed awards of liquidated damages. *See supra* note 195. Another potential enhancement would be the award of attorneys' fees. The Department, however, has long opposed the expansion of fee shifting statutes and we do not recommend the inclusion of attorneys' fee provisions in this context.

important criminal justice goals. These include establishing the truth in criminal cases, protecting the public from obviously guilty defendants, maintaining the integrity and credibility of the criminal justice system, and achieving a rational allocation of scarce criminal justice resources. The problems caused by the exclusionary rule are particularly intolerable in light of the availability of alternative means to reasonably guard against and redress fourth amendment violations. Accordingly, we recommend that the Department seek complete abolition of the exclusionary rule from federal and state proceedings. This goal should be pursued through a comprehensive program of legislative, litigative, and administrative initiatives.

A. Legislative Initiatives

The Department should take two steps. First, it should encourage an amendment to S. 237, the principal exclusionary rule bill now pending before the Senate Judiciary Committee. In its present form, that bill would establish a statutory exception to the rule in cases in which a search or seizure was conducted in an objectively reasonable, good faith belief that it was lawful. The Department has previously supported this approach, but we should now make clear our preference for outright abolition of the exclusionary rule, and should seek an amendment to the bill—in the nature of a substitute—to that end.[211] Even if this approach does not succeed, we are not likely to lose any votes in favor of the "good faith" approach, as a majority of the Committee has previously indicated a preference for even more substantial limitations on the rule. In any event, if this recommendation is adopted, we must act immediately, since Committee action on the bill is expected in the near future.

Second, we should continue to support amendments to the FTCA along the lines we proposed in the Comprehensive Crime Control Act of 1983,[212] to make the United States the exclusive defendant in suits based on constitutional torts committed by its employees. This would provide a remedy that would be more useful and more likely to be perceived as an adequate substi-

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211. Although the hearings that have been held on S. 237 and on earlier exclusionary rule bills probably have created a record that would support abolition of the rule, the Committee may wish to hold an additional hearing on this specific point if the proposed amendment is offered. In that event, the Department could provide testimony explaining its preference for a more complete reform measure.

212. *See supra* note 195.

tute—at least in part—for the exclusionary rule. However, it would not be desirable to deprive the United States of the defense of qualified immunity now available to its employees in *Bivens* and most FTCA suits. Moreover, once it is clear that the exclusionary rule exists only to deter bad faith searches and seizures, it will also be clear that civil actions where liability is limited to bad faith cases provide an adequate remedial substitute for the rule, and that a civil remedy involving a more liberal scope of liability is unnecessary. Therefore, the Department should continue to resist the creation of any new civil remedy for fourth amendment violations that provides recovery for actions taken in good faith.

B. Litigative Initiatives

The Department should argue that, in view of the ineffectiveness of the exclusionary rule, the viability of alternatives, and the Supreme Court's decisions since *Mapp* emphasizing the nonconstitutional status of the rule, the Court should cease to require application of the exclusionary rule in federal or state prosecutions. With respect to federal prosecutions, we should endeavor to bring before the Court a case that squarely raises the issue of the rule's viability in a situation in which the "good faith" exception would not be available. If possible, this should be a case in which the officer thought he was acting properly but his belief was found not to be objectively reasonable, and in which he was sued and subjected to administrative sanctions. In such a case, we should argue that existing—or appropriately modified—federal administrative practices and civil remedies provide adequate deterrent and remedial substitutes.[213]

We should also seek to participate as an amicus in appropriate state challenges to the exclusionary rule in the Supreme Court.

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213. Another argument that might be made is that—regardless of the wisdom of the rule—the Court lacks the power to impose it even in the federal system. Such an argument would require careful analysis of the Court's ill-defined "supervisory power" over lower federal courts, an exercise that is beyond the scope of this Report. In essence, the argument would have two prongs. The first point would be that the Court has no common law authority to establish rules of evidence for use in federal courts and that, even if it had such power, the power would be limited to the prescription of rules designed to ensure the accuracy of the fact-finding process, a goal that the exclusionary rule plainly does not serve. The second point would be that the existence of such limited authority to lay down rules of evidence (assuming that it does exist) does not permit the Court—in the guise of performing that function—to control the behavior of Executive Branch officials.

The first argument to make in such an amicus brief is that the Court has no power to require state courts to exclude evidence on the basis of fourth amendment violations because the Court's "supervisory power" does not extend to state courts.[214] Second, we should argue that—apart from the question of power—as a matter of policy the rule should no longer be imposed on the states. Suits under 42 U.S.C. § 1983 and relevant state law, together with appropriate administrative practices and remedies, provide sufficient deterrence and remedies for fourth amendment violations by state law enforcement officers to justify abandonment of the exclusionary rule on policy grounds.

C. Administrative Initiatives

The Department should undertake a series of administrative initiatives to (1) ensure that federal law enforcement agents continue to adhere to constitutional requirements, and (2) strengthen its position in future debates over the exclusionary rule. To begin with, the Department should begin an "outreach" program designed to publicize the effectiveness of existing administrative practices in preventing unlawful searches and seizures, and punishing the responsible employees when they are at fault.

Second, the Department should review existing administrative practices to determine whether they might be strengthened without detriment to effective law enforcement. One step in this direction would be to explore, with other federal departments and agencies having law enforcement authority, the possibility of creating a Justice Department Review Board—perhaps simply by expanding the jurisdiction of the Department's Office of Professional Responsibility—to examine and take appropriate administrative action with respect to all questionable searches and seizures by federal law enforcement officers.

Third, the Department should commission or undertake empirical research concerning two questions bearing on the future of the exclusionary rule in both federal and state courts—the use and effectiveness of existing civil remedies for fourth amendment violations, and the degree to which the resolution of suppression issues burdens courts and prosecutors' offices. A dem-

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214. *See supra* Part II.C; *see also* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, 'TRUTH IN CRIMINAL JUSTICE' SERIES, REPORT NO. 1, *The Law of Pretrial Interrogation*, Part II. C.1 (1986), *reprinted in* 22 U. MICH. J.L. REF. 437, 526-27 (1989).

onstration that the existing remedies are utilized with reasonable frequency and with success in deserving cases would make a strong case for their value as a partial substitute for the exclusionary rule. Moreover, an empirical demonstration of the unconscionable expenditure of justice system resources on suppression motions—even under a diluted exclusionary rule—would provide convincing support for the argument that the rule is too costly in any form.

In sum, complete elimination of the exclusionary rule from federal and state criminal proceedings is a worthy and attainable goal. It should be pursued through a program of initiatives along the lines recommended above.

APPENDIX A: TEXT OF THE FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX B: SELECTED EXCLUSIONARY RULE CASES

The exclusionary rule has been criticized for causing the release of individuals who were clearly guilty but whose convictions were based on evidence obtained in a manner that was later held to violate fourth amendment search and seizure standards. This appendix presents some illustrative cases in which appellate courts reversed or vacated and remanded convictions on the grounds that evidence used to convict in the trial court should have been suppressed.

1. *United States v. Gillespie*[215]— FBI and local police arrived at the home of Gillespie armed with arrest warrants for fugitives believed to be inside. Gillespie admitted the officers and accompanied them on a room-by-room search. No fugitives were found, but contraband (heroin) was discovered. More heroin was seized during two subsequent searches, Gillespie freely consenting to both. Notwithstanding these facts, the Seventh Circuit reversed Gillespie's conviction. The appeals court said that because the FBI and local police officers were armed with shotguns and revolvers when they appeared at Gillespie's door, "Gillespie could only have felt he had no choice but to let in the officers." The court held that the first search was illegal, and that the second and third searches, although freely consented to, were "entirely the product of the first unconstitutional search." Accordingly, all of the drugs seized were inadmissible.

2. *United States v. Sanchez-Jaramillo*[216]— INS agents, acting with probable cause, arrested Sanchez on a charge of counterfeiting alien registration cards. After being arrested, Sanchez consented to a search of his apartment. During the search the agents found Cruz in a bedroom, read him his *Miranda* rights, and told him to sit in the living room with Mr. and Mrs. Sanchez while they continued to search. Two locked suitcases were then found in the bedroom where Cruz had been sleeping. Cruz told the agents they belonged to him. At the agents' direction Cruz opened the suitcases. Cash and materials used to counterfeit alien registration cards were found inside. Cruz was then arrested. He was later convicted. The Seventh Circuit overturned the conviction. The court held that the agents lacked probable cause to detain Cruz, and that any "consent" Cruz gave for the search of the suitcases was ineffective, as it could not be

215. 650 F.2d 127 (7th Cir. 1981), *cert. denied*, 458 U.S. 1111 (1982).
216. 637 F.2d 1094 (7th Cir.), *cert. denied*, 449 U.S. 862 (1980).

sufficiently voluntary to purge the "taint" of the illegal detention. The court held that both the evidence in the suitcases and the statements made by Cruz subsequent to the search should have been suppressed.

3. *United States v. Perez-Esparza*[217]— An informer who had previously supplied the DEA with reliable information twenty out of twenty-five times tipped them that a specific car was being used to smuggle narcotics from Mexico into the United States. Border Patrol agents subsequently stopped the car and detained the driver, Perez-Esparza, for two and one-half hours until DEA agents arrived. Perez-Esparza was then read the *Miranda* warnings, told that he was being detained on suspicion that his car was transporting narcotics, and further told that agents were obtaining a warrant for a search of the car. Perez-Esparza then gave both oral and written consent to a search of the car. The search uncovered cocaine. After again being warned of his rights, Perez-Esparza confessed.

The Ninth Circuit overturned the conviction. The court reasoned that while the informer's tip provided a sufficient basis for officers to stop the car and question its driver, it did not support probable cause for an arrest. Thus, the two and one-half hour wait for DEA agents to arrive was an illegal "arrest," rendering the suspect's consent to the search of his car ineffective, even though the court agreed the consent was fully "voluntary." All evidence stemming from the defective consent to the search was therefore suppressed.

4. *United States v. Lockett*[218]— Federal agents acting pursuant to a search warrant found eighty-five sticks of dynamite stored on the premises of Lockett, who was subsequently convicted. The conviction was reversed by the Eleventh Circuit, which found that the affidavit supporting the warrant did not allege sufficient facts for a magistrate to conclude that explosives were stored on the specific property searched. This despite the fact that the affidavit did aver (1) that Lockett had purchased a case of dynamite on a specific date, (2) that Lockett had made several threats against his former employers and had mentioned explosives in such threats, and (3) that a bomb made of the same type of dynamite as that purchased by Lockett had been discovered at a facility of his former employer sixty miles from Lockett's home.

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217. 609 F.2d 1284 (9th Cir. 1979).
218. 674 F.2d 843 (11th Cir. 1982).

5. *People v. Trudeau*[219]— A night watchman was killed by crowbar blows to the head during the attempted burglary of a Michigan synagogue. A heel print at the scene was one of the few leads. Approximately two weeks later Trudeau was arrested in a United States Post Office where he had attempted to break and enter a vault. Because of the similarity of the crimes a detective assigned to the murder case went to the preliminary hearing on the Post Office case in order to view the defendant's shoes. Later the same day at the jail, Trudeau refused to turn over his shoes to the police. Acting without a warrant, officers removed the shoes and gave them to the detective. Trudeau was convicted at trial in part due to expert testimony comparing the seized shoes with the print. The Michigan Supreme Court reversed and remanded for a new trial on the grounds that there was no probable cause and no warrant for the seizure, and that the shoes were therefore taken in violation of the fourth amendment and should not have been allowed in evidence.

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The following case involves evidence thrown out at the preliminary hearing phase.

People v. Padilla & Corona[220]— California narcotics detectives arrested a couple for possession of narcotics. The suspects had a nine-month-old baby with them, in whose diapers the detectives found heroin. At a preliminary hearing in the case a judge threw out the evidence because "a baby has the rights of a person, and must therefore be afforded the protection of the Constitution." The judge said that since a nine-month-old was too young to consent to a search, the evidence must be suppressed and the case dismissed.

219. 385 Mich. 276, 187 N.W.2d 890 (1971), *cert. denied*, 405 U.S. 965 (1972).
220. Cal. Mun. Ct., Dec. 29, 1970.

APPENDIX C: A BRIEF NOTE ON *Mapp v. Ohio*

Dollree Mapp was convicted for possession of obscene materials, found in her home during a search by Cleveland police. The police were interested in obtaining information relating to an extortionist bombing. Dollree Mapp was believed to be the girlfriend of one of the men associated with the crime. She had earlier been arrested in another county and had given police a statement on the involvement of several men in the extortion scheme. However, she subsequently pled the fifth amendment and refused to testify in court against the men she had named.

When the police went to Mapp's home they believed the bomber might be hiding inside. Upon arrival, the police knocked and demanded entrance. After telephoning an attorney, Mapp refused to admit them without a search warrant. The officers advised their headquarters of the problem and set up watch outside the house. In the meantime an affidavit was prepared but the police were unable to locate a judge and get a warrant.

About three hours after the initial try at entry, more officers arrived at the house, armed with the affidavit but no warrant. Police then forced their way into the house and showed Mapp the affidavit, which she took from them and placed "in her bosom". A struggle ensued, and the police recovered the affidavit. They then searched the house, finding not the bombing suspect but the obscene materials.[221]

In her appeal to the Supreme Court Mapp did not urge that *Wolf v. Colorado* be overruled. Indeed, the Supreme Court in its opinion chose not to address any of the issues Mapp raised. Instead, the Court observed in a footnote that this exclusionary rule issue had been raised only by an *amicus curiae* in the case. But the Court disposed of the case entirely on the exclusionary rule ground, stating that the issues actually raised by Mapp "need not be decided."[222]

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221. The facts described in the preceding paragraphs have been gleaned from the *Mapp* opinion, 367 U.S. 643 (1961), and the transcript of an interview between Eugene H. Methvin, now a senior editor at *Reader's Digest*, and John Corrigan, Cleveland District Attorney at the time of *Mapp*, conducted in 1966. A copy of this transcript is in the possession of the Office of Legal Policy.

222. *Mapp*, 367 U.S. at 646 n.3.